

# Compensation for Personal Injury in France

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## 1. Introduction

The typical feature of personal injury compensation within the European Community is still diversity. One of the principal considerations affecting the mind of a lawyer advising a client who has a choice of jurisdictions within the Community in which to bring proceedings is where the recovering of damages is likely to be the easiest and the greatest. In considering some of the difficulties which may be encountered when dealing with this topic, this article aims at giving the general framework of the different sources of personal injury compensation in France.

Work, home and leisure activities have altered dramatically, thereby significantly changing the nature of the accidents. The protection of bodily integrity is now prescribed in article 16-1 of the French civil Code<sup>1</sup> (as well as in Article 2 of the European Convention on Human Rights). The right to bodily integrity is foremost among the rights of personality.

The victim of a personal injury has several legal means to claim compensation for his loss. Historically, the first of these have been the mechanisms of tort and contract liability. An ever more comprehensive system of social security has been later implemented. However the new developments don't threaten neither tort law nor contract law as regards to personal injury. Hence this article contains an overview of the liability rules which provide the injured person with compensation as well as of the different heads of damages which are compensated.

### 1.1 Sources of personal injury compensation

The law of personal injuries has been at the heart of the development of French tort law during the twentieth century. However, other forms of regulation have narrowed the role of tort law because of its perceived inadequacy in some specific fields (road traffic injuries for example). New institutional regimes in the areas of work accidents and road traffic accidents have reduced the ambit of personal injury law. The growth of the insurance industry has improved the prospects of recovery for personal injury victims (motorists are required to be insured). Insurers have built liability insurance into standard household insurance policies. Most injured persons can be treated in public hospitals.

At the close of the nineteenth century (Law of 9 April 1898), tort law was supplanted by a system of workers' compensation which still dominates the treatment of workplace injuries at the beginning of the twenty-first century<sup>2</sup>. Prior to 1898, injured workers had to sue in tort to recover damages from their employer for occupational injuries. This regime was widely considered to be inadequate to provide for lost wages and the medical care which victims needed. Nowadays, an injured person

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<sup>1</sup> Loi n° 94-653 of 29 July 1994 *relative au respect du corps humain*, in Code civil, articles 16 to 16-12 ;J. MASSIP, *L'insertion dans le Code civil des dispositions relatives au corps humain, à l'identification génétique et à la procréation médicalement assistée*, *Gaz. Pal.*, 5-6 April 1995, p. 2-19 ;Ch. JAMIN, commentaire *R.T.D. civ.* 1994, p. 934

<sup>2</sup> SAUZET, *De la responsabilité des patrons vis-à-vis des ouvriers dans les accidents industriels*, *Rev. crit.* 1883 ;SAINCTELETTE, *De la responsabilité et de la garantie*, 1884 ;R. SALEILLES, *Les accidents du travail et la responsabilité civile*, 1897 and *La réforme sociale*, 1898 ;M. VOIRIN, *De la responsabilité civile à la Sécurité sociale pour la réparation des dommages corporels : extension ou disparition de la branche des accidents du travail?*, *R.I.D. comparé*, 1979, p. 541.

often continues to receive his pay, in whole or in part, for the period he is unable to work. There is statutory sick pay, which the employer is required by law to pay during the first few weeks of sickness or disability. In respect of disability, the Social Security system, first enacted in 1945<sup>3</sup>, provides substantial income replacement benefits, for a reasonably high proportion of lost wages. A significant percentage of medical treatment and hospital care costs is paid directly by the appropriate Social Security institution. Non-pecuniary losses are outside this specific scheme.

Hospital benefits are paid up to 100 % under the work accident system where the injury occurred at the workplace (where the accident did not take place at work, these costs are paid by the Social Security system).

Since 1958, there has been an obligation on motorists to be insured<sup>4</sup>. A no-fault scheme has replaced claims for road traffic injuries<sup>5</sup>. The no-fault law extinguishes the legal rights of those who have suffered injury in return for a guarantee of compensation, regardless of who was to blame for the accident.

Where there is no basis for finding a person liable for an accident, such a victim will be compensated by the Social Security system. Although this system provides for only limited compensation, the victim will be automatically and immediately indemnified for any injuries suffered.

There has also been a realisation that it is necessary to insure against health care costs whether or not the event which gave rise to the accident (or illness) was caused by the fault of another or are occupational injuries.<sup>6</sup> The insurer is entitled, by means of a complicated process, to recoup its expenses from the award of damages.

Apart from specific legislation regulating the provision of compensation for road traffic injuries, there are a number of other schemes which provide compensation for different categories of injury in particular defined circumstances. Reference has already been made to the scheme for occupational injuries<sup>7</sup>. The tragic scandal over infected blood transfusions provided the impetus to the legislature to draw up a scheme<sup>8</sup>. In 1991, the Fund for the compensation of persons infected with the HIV virus in the course of blood transfusions or the injection of blood products in France was established<sup>9</sup>. In 1998, the legislature passed particular legislation<sup>10</sup> implementing EU Directive

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<sup>3</sup> See Ordonnance of 4 October 1945 and recently, Loi n° 99.641 of 27 July 1999 (Loi portant création d'une couverture maladie universelle), *Journal Officiel* 28 July 1999 ; J.-P. CHAUCHARD, *Droit de la Sécurité sociale*, L.G.D.J., 2d ed., 1998 ; J.J. DUPEYROUX and R. RUELLAU, *Droit de la Sécurité sociale*, Dalloz, 13<sup>th</sup> ed. 1998; D.C. LAMBERT, *L'Etat providence en question*, Economica, 1990.

<sup>4</sup> See Law of 27 February 1958.

<sup>5</sup> See Law n° 85-677 of 5 July 1985, *Loi tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*, *Journal Officiel* of 6 July 1985; CHABAS, *Les accidents de la circulation*, Dalloz, 1995 ; LAMBERT-FAIVRE, *Droit des assurances*, Dalloz, 11<sup>th</sup> ed., 2001 ; TUNC, *Pour une loi sur les accidents de la circulation*, Economica, 1981 ; VINEY, *L'indemnisation des victimes d'accidents de la circulation*, L.G.D.J., 1992.

<sup>6</sup> LAMBERT-FAIVRE, *Droit des assurances*, Dalloz, 11<sup>th</sup> ed., 2001, n°878 to 1050 ; J.-M. LIEF, *Les contrats en assurances de personnes*, R.F.D.C. 1990, p. 451 to 477 ; G. BRIENS, *L'entreprise et le droit de la protection sociale complémentaire*, Litec, 1990.

<sup>7</sup> Compensation is paid by the Social Security institution (law of 30 October 1946, translated into art. L. 411-1 and following of the Social Security Code). The system is however exclusive, and the victim is precluded from claiming damages in tort from the employer (art. L. 451-1 of the Social Security Code).

<sup>8</sup> M.-D. GMERK, *Histoire du sida, début et origine d'une pandémie actuelle*, Plon, 1989.

<sup>9</sup> Law n° 91-1406 of 31 December 1991 ; see Y. LAMBERT-FAIVRE, *L'indemnisation des victimes post-transfusionnelles du sida : hier, aujourd'hui et demain*, R.T.D.civ. 1993, p. 1. The law creates a special fund with the aim of compensating the victims who suffered from infected blood transfusions. The victim has a right to sue the blood transfusion centre (on the basis of a strict contractual duty: there is an *obligation de sécurité* in the contract according to which the contract

85/374 on product liability<sup>11</sup>. A fund for the compensation of victims of acts of terrorism and criminal offences was set up in 1990<sup>12</sup>. The latest fund, which seeks to compensate the victims of asbestos, was established in October 2001<sup>13</sup>.

Notwithstanding the presence of specific no-fault schemes, which compensate all victims without the need to prove fault, there is some diversity in the provision of personal injury compensation. Since there is no comprehensive mechanism for compensating personal injury victims, this can lead to discrimination amongst victims according to the event or circumstances which caused the injury<sup>14</sup>.

The main point to recognise is that personal injury law serves a different compensation function from that which it might have served had these alternative compensation schemes not been created. Indeed, as a practical matter, for many tort victims the main component of compensation provided by the legal system is not for out of pocket economic losses. Thus, a significant amount of money is awarded for “pain and suffering” (non-pecuniary losses), sufficient to cause victims to recover this extra compensation via litigation.

## 1.2. Personal injury law

Until the twentieth century, French jurisprudence required proof of fault in accordance with Article 1382 of the French civil Code (this article makes provision for general liability as follows: “Anyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage”), except in the case of industrial accidents where the injured workman benefited from the law of 9 April 1898 which released him from the necessity of proving fault.

The central change in personal injury law doctrine has been the evolution of a robust regime of liability without fault.<sup>15</sup> Damage caused by things (since the famous *Teffaine* decision of the *Cour de cassation* in 1896)<sup>16</sup> has been governed by Article 1384.1 which provides that a person is

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has protective effect towards the creditor. Once the victim has obtained full compensation from the special public fund, he will be precluded from suing the blood transfusion centre (Civ. 2<sup>e</sup>, 26 January 1994, *Gaz. Pal.*, 24-26 July 1994, p. 3; Cass. Ass. Plén. 6 June 1997, *D.* 1998.255). The fund is supposed to make an offer of compensation within three months of a demand.

<sup>10</sup> Law n° 98-389 of 19 May 1998 *relative à la responsabilité du fait des produits défectueux*, JO of 21 May 1998 :articles 1386-1 to 1386-18, comprising the new “*Titre IV :de la responsabilité du fait des produits défectueux*” of the Civil Code ;J. GHESTIN, *De la responsabilité du fait des produits défectueux*, *J.C.P.* 1998.I.148 ;G. VINEY, *L'introduction en droit français de la directive européenne du 25 juillet 1985 relative à la responsabilité du fait des produits défectueux*, *D.* 1998, Chron. P. 291 ;F. CHABAS, *La responsabilité pour défaut de sécurité des produits, dans la loi du 19 mai 1998*, *Gaz. Pal.*, 9-10 September 1998, Doctr. p. 2 ;C. LARROUMET, *La responsabilité du fait des produits défectueux après la loi du 19 mai 1998*, *D.* 1998, Chron. p. 311 ;P. JOURDAIN, *Une loi pour rien ? ...*, *R.C.A.* 1998 chron. n° 16.

<sup>11</sup> Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products ([1985] O.J. L 210/29.

<sup>12</sup> Law n° 90-589 of 6 July 1990 ;D. GARREAU and D. LAURIER, *L'indemnisation des victimes d'infractions selon la loi du 6 juill. 1990 :les premières décisions de la Cour de cassation*, *Gaz. Pal.*, 13 nov. 1992, p. 3.

<sup>13</sup> Law of 23 December 2000 and the implementing Decree of 24 October 2001.

<sup>14</sup> See Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, 4<sup>th</sup> ed., 2000, advocating greater unity in personal injury compensation, at 18. See also L. MELENNEC, *L'indemnisation du handicap: pour l'instauration d'un régime unique en faveur de l'invalidité et de la dépendance*, ed. Desclée de Brouwer, 1997.

<sup>15</sup> See B. STARCK, *Essai d'une théorie générale de la responsabilité civile, considérée en sa double fonction de garantie et de peine privée*, thèse, Paris, 1947 and *Domaine et fondement de la responsabilité sans faute*, *R.T.D. civ.*, 1958, p. 475-515; Y. LAMBERT-FAIVRE, « Fondement et régime de l'obligation de sécurité », *D.* 1994, chr. p. 81 ; A. TUNC, « Responsabilité civile et droit des accidents », *Mélanges Werner LORENZ*, éd. Mohr.; STARK, ROLAND et BOYER, *Obligations*, Litec, 4<sup>e</sup> éd. 1991, n° 57 et s.

<sup>16</sup> Civ., 16 June 1896, *s.* 1897, I, 17, note A. ESMEIN.

responsible for damage caused by things which are under his control (Article 1384 states: “[Man] is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping...”). The other change, which took place in 1911<sup>17</sup>, was the “discovery” of an *obligation de sécurité*, which was incorporated or implied into various contracts. The French courts have been able to adapt certain articles of the *Code civil* in order to create a contractual action for damages to compensate the buyer for physical injury. The *obligation de sécurité* is an *obligation de résultat*, and although it was particular to the law on the carriage of passengers (see the decision cited above), has been found to be present in various other categories of contract. Since the obligation is an *obligation de résultat*, the defendant is strictly liable should damage occur.

Civil liability (both contractual and non-contractual), as developed by the courts in order to protect victims of personal injury, whether by finding *obligations de sécurité* or *obligations de garantie* in particular types of contract or by using Article 1384(1) *Code civil*, has brought about a generally accepted “right to bodily integrity”<sup>18</sup>. However, in certain circumstances, fault-based liability (both contractual and non-contractual) is still relevant. In these cases the plaintiff must establish fault, and the conduct of the defendant will clearly be relevant. Below, we describe how the two differing regimes on liability (liability for fault and strict liability) apply, before briefly setting out the specific no-fault schemes.

### 1.2.1 Liability for fault

Liability in both tort and contract can be based on the fault of the defendant.

#### 1.2.1.1 In Tort

Liability can arise due to an act or an omission. The tortfeasor may create a risk for the victim whether by an act or by an omission. Under Article 1382 of the civil Code<sup>19</sup>, the person who caused an event to happen, and who was at fault, is liable for it. Article 1383 stipulates that liability is also established where conduct manifests itself in the form of an omission<sup>20</sup>. Misconduct occurs where the defendant acts in breach of a statutory duty or the rules of conduct derived from the general principle of *neminem laedere*<sup>21</sup>. The courts evaluate whether the individual exercised the degree of care expected of the reasonable man in the particular circumstances. Under article 1382, liability depends upon the defendant’s fault.

The existence, content and scope of the relevant duty of care depend upon a variety of issues. For some causes of action, compensation will be awarded only where the plaintiff is able to prove negligence on the part of the defendant (for example where there is a breach of the right to one’s own image<sup>22</sup>, or in cases of unfair competition). Here, the mere occurrence of damage will not necessarily lead to the conclusion that there has been misconduct. In relation to sporting activities too, we find examples of the requirement to prove fault on the part of the defendant. Courts use the concept of acceptance of risks to prevent the victim from claiming for injuries where no fault has

<sup>17</sup> Civ., 21 November 1911, *D.* 1913, I, 249, commentary by SARRUT; *S.* 1912, I, 73, commentary by LYON-CAEN.

<sup>18</sup> G. VINEY, *Introduction à la responsabilité*, Paris, L.G.D.J., 1995, p.57.

<sup>19</sup> “Anyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage”.

<sup>20</sup> “Everyone is responsible for the damage caused not only by his act but also by his negligence or carelessness”

<sup>21</sup> G. RIPERT, *La règle morale dans les obligations civiles*, L.G.D.J., 4<sup>th</sup> ed., 1949 ; B. STARCK, H. ROLAND, L. BOYER, *Droit civil, Obligations, Responsabilité délictuelle*, 6<sup>th</sup> ed., 1998, n°28 ; G. VINEY, *La responsabilité : conditions*, L.G.D.J., 2d ed., 1998, n° 48 ; F. TERRÉ, Y. LEQUETTE, P. SIMLER, *Les obligations*, Dalloz, 7<sup>th</sup> ed., 1999 ;

<sup>22</sup> Paris, 4 April 1970, *J.C.P.* 1970.II.16328, commentary by R.L., *case Pompidou c. L’Express*; Paris, 13 February 1971, *J.C.P.* 1971.II.16774, commentary by LINDON, *case Belmondo*.

occurred<sup>23</sup>. Accordingly, there is a “neutralisation” of any strict liability because of the acceptance of risk and hazard.

### 1.2.1.2 *In Contract*

In respect of the framework of rules on liability, French law frequently does not make any distinction in relation to the application of the rules in contract and in tort<sup>24</sup>. This holds true in particular for medical liability. Until 1936<sup>25</sup>, where a doctor caused damage through negligence, the French courts required the party seeking to recover damages to proceed on the basis of the general rule on tortious liability contained in Article 1382 of the civil Code. The injured person thus had to prove the doctor’s fault, regardless of whether or not there was a contract between the patient and the doctor. If a claim for damages is based on the existence of a contract, Article 1147 of the civil Code, which establishes a presumption of fault, applies. According to this article a person who has committed a breach of contract is bound to pay damages, unless excused by *force majeure*, where he has not performed his obligation correctly and in time. It was thought that such a burden would tend to render the performance of the doctor’s task more difficult. However, there is a presumption that the physician does not undertake to cure the patient, but simply to apply his medical expertise diligently and in conformity with medical science<sup>26</sup>. The burden is on the injured person to prove that conscientious and diligent medical care in conformity with established standards has not been provided. However, the courts may apply a presumption to establish the fault of the doctor<sup>27</sup>. A recent decision of the Court of Appeal of Paris has endorsed the view that the relationship between the physician and his client results in an *obligation de sécurité de résultat* (strict safety liability) where the worsening of the patient’s condition is not connected to or caused by the existence of any previous condition<sup>28</sup>.

### 1.2.1.3 *In public law*

Two non-contractual liability regimes for public authorities exist under French administrative law. The first is fault-based, and liability applies whenever any administrative action is found by the

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<sup>23</sup> Compare, for example, cases on damage caused by balls in various different games: *pelote basque* (Pau, 1<sup>st</sup> April 1982 and 29 April 1982, *D.* 1983, IR, 507, commentary by ALAPHILIPPE and KARAQUILLO); squash (Civ. 2<sup>e</sup>, 28 January 1987, *J.C.P.* 1987.IV.112); football (Civ. 2<sup>e</sup>, 22 June 1983, *Bull. civ.* II, n° 93).

<sup>24</sup> The relevant rules on contractual liability are articles 1146 and following of the civil Code.

<sup>25</sup> Civ. 20 May 1936, *MERCIER* case, *D.* 1936, I, 88, concl. MATTER, rapp. JOSSERAND, commentary by E.P.; the contract is between the victim and the clinic (Civ. 1<sup>re</sup>, 4 juin 1991, *J.C.P.* 1991.II.21370, commentary by J. SAVATIER ; *R.T.D. civ.* 1992, 123, obs. JOURDAIN ; R. SAURY, *Le contrat médical ; les aspects juridiques du colloque singulier entre le médecin et le malade*, *R.F.D.C.* 1996.2, p. 117.

<sup>26</sup> Cass. 18 June 1835, *S.* 1835, 399, concl. Proc. gén. DUPIN (general principle of fault liability); negligent diagnosis: Civ. 1<sup>re</sup>, 3 February 1993, *R.C.A.*, 1993, n° 174; negligent choice of therapy :Civ. 1<sup>re</sup>, 28 April 1987, *D.* 1987, I.R. p. 423 (injury of a child during delivery) ;Civ. 1<sup>re</sup>, 25 November 1997, *R.C.A.* 1997, n° 274 (delayed hospitalisation) ; application of a negligent technique: Civ. 26 January 1972, *J.C.P.* 1972.IV.60 (failure to remove a surgical instrument) ;Civ. 1<sup>re</sup>, 13 October 1999, *J.C.P.* 2000.II.10270, commentary by DORSNER-DOLIVET (awkwardness is a fault). On the duty to inform: Ph. LE TOURNEAU, *Quelques aspects des responsabilités professionnelles*, *Gaz. Pal.*, 8 October 1976; F. CHABAS, *L’obligation médicale d’information en danger*, *J.C.P.* 2000.I.212 ; P. SARGOS, *L’obligation d’informer le patient*, *Petites affiches* 1999, n° 189, p. 9 ;Civ. 1<sup>re</sup>, 16 July 1991, *J.C.P.* 1992.II.21947, commentary by DORSNER-DOLIVET (failure to inform about the risks to the child of a pregnant woman, infected with rubella; Civ. 1<sup>re</sup>, 2 mars 1994, *R.C.A.* 1994, n° 220 (failure to inform about the risks of carrying out an operation).

<sup>27</sup> J. PICARD, *Le recours du juge civil à la présomption en matière de responsabilité médicale*, *Gaz. Pal.*, 12-13 July 1995, p. 36 ; Civ. 1<sup>re</sup>, 17 June 1980, *R.T.D.civ.* 1981.166, commentary by DURRY; Civ. 1<sup>re</sup>, 19 February 1991, *R.C.A.* 1991, n°190 ; Civ. 1<sup>re</sup>, 27 mai 1998, *D.* 1999, p. 21 commentary by PORCHY ;Y LAMBERT-FAIVRE, *L’exigence de sécurité et la prospective juridique en matière de responsabilité médicale*, *R.F.D.C.*, 1996.4.

<sup>28</sup> Paris, 15 January 1999, *J.C.P.* 1999.II.10068, commentary by L. BOY ;*Gaz. Pal.*, 16-17 June 1999, p. 74, commentary by F.-J. PANSIER and J.-B. BLADIER, *Étude de l’évolution de la responsabilité médicale au travers de l’énoncé jurisprudentiel d’une obligation de sécurité à la charge du médecin.*

*Conseil d'État* to be unlawful. The second is a no-fault regime applicable in certain circumstances and which is based on the principle of equality before public burdens. Liability for fault is divided into two categories: liability for "simple" fault (*faute simple*) and liability for "gross" fault (*faute lourde*). Only those acts which are so serious as to evidence a complete lack of responsibility constitute "gross" fault. A medical practitioner employed by the State was liable for fault only when his actions were such as to constitute "gross" fault. This was aimed at preserving the autonomy of those engaged in so-called complex-activities. Until 1992, medical negligence was included within the ambit of the definition of complex-activities. In the V. case<sup>29</sup>, the *Conseil d'État* held that a doctor or surgeon will be liable for fault where his actions constitute "medical fault of such a kind as to engage the liability of the hospital". This was not a case in which the *Conseil d'État* normally would have held the medical practitioner liable, since the fault was not sufficiently serious to constitute gross fault. Thus the standard required has changed, and "simple" fault can now found an action based on medical negligence in the administrative law courts.

Where the requirement to establish fault continues to exist, the courts tend to use presumptions in order to remove from the victim's shoulders the burden of proof. This represents a move towards a regime of strict liability.

### **1.2.2. Liability without fault**

The development in the interpretation of classical rules on liability (for fault) has placed considerable emphasis on the protection of life, bodily integrity and health. The strict protection of these rights may arise both in a contractual framework as well as in the context of non-contractual obligations, and may also be prescribed in legislative measures imposing strict liability for bodily injury. Below we deal first with non-contractual strict liability, before exploring the contractual context and eventually some of the legislative measures which impose strict liability.

#### **1.2.2.1. Strict liability for damages caused by things**

With regard to damage caused by animals and defective buildings, the civil Code has established strict liability (*responsabilité de plein droit*). In the case of damage produced by other things, case law since the *Teffaine* decision<sup>30</sup> has determined that such damage is governed by Article 1384 paragraph 1<sup>31</sup>. (Article 1384.1 was originally read in conjunction with articles 1385 and 1386 as establishing strict liability only when harm was caused by an animal or dangerous building under the defendant's control).

In the landmark *Teffaine* decision, the *Cour de cassation* ruled that Article 1384.1 could be interpreted as a general stand-alone provision providing for a presumption of responsibility where damage is caused by things of whatever sort. In that case, Article 1384.1 was used to award damages to a widow who had sued her husband's employer after he was killed by an exploding boiler.

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<sup>29</sup> C.E., 10 April 1992, M. et Mme V., *J.C.P.* 1992.II.21881, note J. MOREAU, *R.C.A.* 1992, n° 197 ;S. FOURNEL, *Le particularisme de la faute médicale de nature à engager la responsabilité de l'administration*, *Gaz. Pal.*, 8-10 March 1998, p. 18.

<sup>30</sup> See note 15 ;F. BÉNAC-SCHMIDT et Ch. LARROUMET, *Rép. civ.* Dalloz, *V Responsabilité du fait des choses inanimées* ; J. CARBONNIER, *Droit civil*, t. 4 (Les obligations), PUF, 2000, n° 255 ff ;G. VINEY, *La responsabilité : conditions*, 1998, n°628 and f. ;F. TERRÉ, Ph. SIMLER and Y LEQUETTE, *Les obligations*, 2000, n° 714 and f.

<sup>31</sup> "[Each one] is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping. (...)"

This article has been used ever since as the principal tool for the application of strict liability in tort. The courts use the article to impose liability on the sole basis of the “use, direction and control”<sup>32</sup> by the defendant of the thing which caused the damage. We can speak of strict liability since it is no defence for the keeper (*gardien*) to show that he took all the precautions which a prudent and diligent man would have taken<sup>33</sup>.

Three conditions must exist in order for such liability to be imposed:

- A thing must have caused the damage. The principle applies to things which are hazardous such as liquid oxygen for example<sup>34</sup>, explosives<sup>35</sup>, bullets<sup>36</sup>, and to ordinary object such as a chair<sup>37</sup>, bicycle<sup>38</sup>, as well as very big things like ships<sup>39</sup>...
- The act of the thing must be an intervention. Article 1384.1 does not apply in cases where the thing has been “purely passive” in the production of damage. If a moving object has caused harm by colliding with the plaintiff’s person or his property, the presumption of responsibility means that the plaintiff need prove only causation<sup>40</sup>. But if the thing was stationary, or normal, it must be established that the object was the *cause génératrice*, the “generating cause” of the accident<sup>41</sup>.
- The defendant must have had “guard” of the thing. To have guard is normally to have the use, direction and control of the thing (including also the power to direct and control: the employer has control of any thing used by his employees). The owner is usually the *gardien* unless he has lost or transferred the use, direction and control of the thing to someone else<sup>42</sup>.

It should be noted that, prior to the implementation of the directive on product liability, damage caused by defective products was (and still is indeed) largely regulated by the law of contract and Article 1384.1 of the civil Code. Where a person not party to the contract of sale is injured, he may have an action under Article 1384.1 against the producer as *gardien de la structure* (according to this theory, the producer remains the keeper of the structure of the thing, being therefore liable for any damage it causes. This theory is applied where the thing has an “intrinsic dynamism”). The courts have used Article 1384.1 to impose strict liability in tort on the manufacturer<sup>43</sup>.

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<sup>32</sup> Cass. Chambres réunies, 2 December 1941, *D.* 1942, commentary by RIPERT ; *S.* 1941, 1, 217, commentary by H. MAZEAUD ; P. ROUBIER, *L’arrêt des Chambres réunies du 2 décembre 1941 et la théorie générale de la responsabilité civile*, *J.C.P.* 1942.I.257 ; B. GOLDMANN, *La détermination du gardien responsable du fait des choses inanimées*, thèse, Lyon, 1946 and *Garde de la structure et garde du comportement in Mélanges Roubier*, t. 2, 51 ff ; A. TUNC, *La détermination du gardien dans la responsabilité du fait des choses inanimées*, *J.C.P.* 1960.I.1592, N° 11.

<sup>33</sup> Cass. Chambres. réunies, 13 February 1930 (*Jand’heur* decision), *S.* 1930.I.121. This decision is said to be the first by virtue of which Article 1384 was transformed into a general and autonomous strict liability regime for things of all kinds;

<sup>34</sup> Cass. 2<sup>e</sup>, 10 June 1960, *D.* 1960, Jur., p. 609, commentary by R. RODIÈRE ;

<sup>35</sup> *Ville de Montigny-lès-Metz v. Sté Cardem et autres*, *D.* 1994, Jur. p. 80.

<sup>36</sup> Civ. 2<sup>e</sup>, 29 March 1984, *Gaz. Pal.* 1984, 2, pan. 264, commentary by CHABAS.

<sup>37</sup> Civ. 2<sup>e</sup>, 8 mars 1995, *D.* 1995, somm. 232, commentary by DELEBECQUE.

<sup>38</sup> Civ. 2<sup>e</sup>, 18 November 1987, *Gaz. Pal.* 1988, I, pan. 29.

<sup>39</sup> Cass. Chambre mixte, 4 December 1981, *J.C.P.* 1982.II.19748, commentary by H. MAZEAUD.

<sup>40</sup> Civ. 2<sup>e</sup>, 29 May 1964, *J.C.P.* 1965.II.14248, commentary by BORÉ ; Civ. 2<sup>e</sup>, 13 May 1981, *Gaz. Pal.* 1981, 2, pan., 353, commentary by CHABAS ; Civ. 2<sup>e</sup>, 28 November 1984, *J.C.P.* 1985.II.20477, commentary by DEJEAN DE LA BÂTIE.

<sup>41</sup> Civ. 2<sup>e</sup>, 7 March 1979, *D.* 1980, I.R., 35, commentary by LARROUMET (fragility of the glass); Civ. 2<sup>e</sup>, 19 May 1976, *D.* 1976, I.R., 233 (abnormal position of a car).

<sup>42</sup> See note 31.

<sup>43</sup> Despite the fact that the manufacturer does not have the genuine use, direction and control of the product when he has supplied it to another, where the product “has its own dynamism which is liable to create a danger, the courts have drawn a distinction between the “*garde de la structure*” of the product and the “*garde du comportement*”. Though the

Admissible defences are *cas fortuit* and *force majeure* (damage must have been inevitable)<sup>44</sup>. The onus placed on the defendant is said to create an “objective theory of created risk”.

### 1.2.2.2. The contractual “obligation de sécurité”

Initially, *obligations de sécurité* were a form of *obligation de résultat*<sup>45</sup>, particular to the law on the carriage of passengers, which functioned as a strict obligation<sup>46</sup>. Article 1147 of the civil Code does not specifically provide for an action for damages in contract to compensate the buyer for physical injury. However, the judges have attached the *obligation de sécurité* to the seller’s warranty that goods sold are free of hidden defects<sup>47</sup>. The professional seller is presumed to be aware of the defect at the time of sale, which allows the victim to recover damages<sup>48</sup>. Thus professional sellers are strictly liable to the buyer for damage caused by hidden defects in the goods.

But the French courts have also recognised an “*obligation de sécurité*” independent of Article 1641 on the basis of Article 1135, which allows the court to imply terms into a contract<sup>49</sup>. Damages may then be awarded under Article 1147, in the case of the non-performance of a contract<sup>50</sup>. Where a

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manufacturer, on supplying the product, loses control over its behaviour, he retains control over its structure. The plaintiff is not obliged to demonstrate the fault of the manufacturer, nor even the fact that the product was defective; see Cass. 2<sup>e</sup>, 10 June 1960, *D.* 1960, Jur., p. 609, commentary by R. RODIÈRE; Amiens, 10 March 1975, *D.* 1975, I.R., p. 108; Civ. 1<sup>re</sup>, 2 February 1982, *Gaz. Pal.* 1983, I, pan. P. 375, commentary by F.C.; Civ. 2<sup>e</sup>, 16 January 1991, *D.* 1991, I.R. p. 54;

<sup>44</sup> F. CHABAS, *Rép. civ.* Dalloz, *V° Force Majeure*; Civ. 3<sup>e</sup>, 29 June 1988, *D.* 1988, I.R. p. 216; Civ. 2<sup>e</sup>, 21 June 1966, *D.* 1966, 645, commentary by TUNC (black ice); Civ. 2<sup>e</sup>, 5 January 1994, *J.C.P.* 1994.IV.608 (the event must be unforeseeable and unavoidable).

<sup>45</sup> See on the distinction between *obligations de moyens* and *obligations de résultat*: J. FROSSARD, *De la distinction des obligations de moyens et des obligations de résultat*, thèse Lyon, préf. NERSON, 1965; H. MAZEAUD, *L’obligation générale de prudence et de diligence et les obligations déterminées*, *R.T.D. civ.* 1936, p. 1 and f.; TUNC, *La distinction des obligations de résultat et des obligations de diligence*, *R.T.D. civ.* 1962, 334; PLANCQUEEL, *Obligation de moyens, obligation de résultat*, *J.C.P.* 1945.I.449; P. ESMEIN, *Remarques sur de nouvelles classifications des obligations*, *Mélanges Capitant*, 1939, p. 235 and f.; G. VINEY, *Les obligations. La responsabilité: Conditions*, 1998, n° 521 and following.

<sup>46</sup> Civ., 21 November 1911, *S.* 1912, I, 73, commentary by Ch. LYON-CAEN.

<sup>47</sup> Article 1641 provides that “The seller is held to guarantee against hidden defects in the thing sold which render it unsuitable for the use for which it is intended, or which so diminish such use that the buyer would not have purchased it, or would have given only a lesser price for it, had he known of them”; A. BÉNABENT, *Conformité et vices cachés dans la vente: l’éclaircie*, *D.* 1994, Chron. p. 115; C. BOULLEZ, *La garantie des vices: la part maudite de la jurisprudence*, *Gaz. Pal.* 1994, 2, doct. p. 1241; J. CALAIS-AULOY, *De la garantie des vices cachés à la garantie de conformité*; in *Mélanges Christian Mouly*, t. II, Litec, 1998, p. 62.

<sup>48</sup> Article 1645 requires that the seller knew of the hidden defects in order to obtain compensation. The *Cour de cassation* apply a presumption that all professional sellers are aware of the defect: Civ., 24 November 1954, *J.C.P.* 1955.II.8565, commentary by H.B.; Civ. 1<sup>re</sup>, 16 April 1996, *D.* 1996, I.R. p. 136; Civ. 2<sup>e</sup>, 30 March 2000, *D.* 2000, I.R. p. 132;

<sup>49</sup> J. CALAIS-AULOY, *Ne mélangeons plus conformité et sécurité*, *D.* 1993, chron. p. 130; P. JOURDAIN, *L’obligation de sécurité (À Propos de quelques arrêts récents)*, *Gaz. Pal.* 1993, 2, doct. p. 1214; *Le fondement de l’obligation de sécurité*, *Gaz. Pal.* 1997, 2, doct. p. 1196; Y. LAMBERT-FAIVRE, *Fondement et régime de l’obligation de sécurité*, *D.* 1994, chron. p. 81; D. MAZEAUD, *Le régime de l’obligation de sécurité*, *Gaz. Pal.* 1997, 2, doct. p. 1201; J.-F. OVERSTAKE, *La responsabilité du fabricant de produits dangereux*, *R.T.D. civ.* 1972, p. 485; Ph. LE TOURNEAU, *La distinction des obligations de moyens et de résultat et l’obligation de sécurité*, *J.-Cl. Civil*, articles 1136 to 1145, fasc. 30, 1994.

<sup>50</sup> The *obligation de sécurité* has been “discovered” in many contracts: Civ., 21 November 1911, *S.* 1912.I.73, commentary by LYON-CAEN (carriage of passengers); Civ. 1<sup>re</sup>, 18 February 1986, *R.T.D. civ.* 1986.770, commentary by HUET (entertainment for children); Civ. 1<sup>re</sup>, 8 October 1968, *J.C.P.* 1969.II.15745, commentary by W.R. (ski tow); Civ. 1<sup>re</sup>, 22 May 1991, *R.T.D. civ.* 1991.757, commentary by JOURDAIN (hotel); Civ. 1<sup>re</sup>, 15 July 1999, *R.C.A.* 1999, n° 314 (maintenance of a lift).

person has suffered personal injury, the victim has a strict liability claim, and it will be no defence for the defendant to prove that it was impossible to discover the defect<sup>51</sup>.

The problem of privity of contract has also been avoided thanks to the application of the principle of *action directe*, according to which the contractual *obligation de sécurité* is attached to the product and is transferred along with it from buyer to buyer<sup>52</sup>. Third-party victims are protected as a result of an important decision of 17 January 1995<sup>53</sup> in which the *Cour de cassation* declared the supplier to be strictly liable to the third-party victim (“the professional seller is under an obligation to deliver products exempt from vice or manufacturing defects which are susceptible to create a danger to persons or goods; and he is liable in the same manner to third parties as to the purchaser”).

Thus, as a consequence of applying the contractual *obligation de sécurité*, a right to bodily integrity is created. Such a right may also arise from legislative measures imposing strict liability for injury to life, body or health.

### 1.2.2.3. Legislative measures

The two most important statutes which have been enacted in order to protect victims against all kind of harmful behaviour are, firstly, the *Loi Badinter* of 5 July 1985 and, secondly, the Law of 31 December 1991.

The first establishes a completely autonomous no-fault scheme which compensates all victims of road traffic accidents other than the driver for their injuries:

- There is compulsory motor insurance in order to cover the liability of the *gardien* (keeper) and the driver for anyone injured in a road traffic accident<sup>54</sup>;
- If the wrongdoer is not insured, the special Guarantee Fund created by statute will compensate the victim<sup>55</sup>.
- Insurers are under an obligation to send a written questionnaire and make an offer of compensation within eight months from the date of the accident (and a definitive offer within 5 months after the insurer is aware of the consolidation of the victim’s injuries)<sup>56</sup>. If the victim

<sup>51</sup> That is indeed what happened in the decision relating to the liability of blood transfusion centres for the contamination of blood infected by the HIV virus: Civ. 1<sup>re</sup>, 12 April 1995 (two decisions), *J.C.P.* 1995.I.3893, commentary by G. VINEY ;Civ. 1<sup>re</sup>, 9 July 1996, *D.* 1996, jur., commentary by Y.LAMBERT-FAIVRE.

<sup>52</sup> Civ. 1<sup>re</sup>, 9 October 1979, *Gaz. Pal.* 19 April 1980, commentary by PLANCQUEEL; Com. 17 May 1982, *R.T.D. civ.* 1983.135, commentary by DURRY; Ch. LARROUMET, *L’action de nature nécessairement contractuelle et la responsabilité civile dans les ensembles contractuels*, *J.C.P.* 1988.I.3357; P. JOURDAIN, *Turbulences dans les groupes de contrats: la responsabilité contractuelle directe du sous-contractant et ses vicissitudes*, *R.T.D. civ.* 1998.760 ;B. TEYSSIÉ, *Les groupes de contrats*, L.G.D.J., 1985.

<sup>53</sup> Civ. 1<sup>re</sup>, 17 January 1995, *D.* 1995.350, commentary by JOURDAIN; *J.C.P.* 1995.I.3853. F. LEDUC, *La spécificité de la responsabilité contractuelle du fait des choses*, *D.* 1996, chr. p. 164.

<sup>54</sup> See Article 211-2 of the *Code des assurances*.

<sup>55</sup> *Fonds de garanties automobile* (64 rue de France, 94 300 Vincennes) ;J. ARCHAMBAUD, *L’indemnisation par le F.G.A. :notion d’implication et principe de subsidiarité*, n° spécial *R.G.A.T.* 1988, sur la loi Badinter, p. 103 ;on the subsidiary character of the compensation by the Fund :Cass. Crim. 1<sup>st</sup> December 1987, *Gaz. Pal.* 1988, 2, 558; Civ. 2<sup>e</sup>, 19 February 1975, *J.C.P.* 1975.II.18159, commentary by BIGOT; Civ. 1<sup>re</sup>, 18 June 1991, *Bull. civ.* I, n° 203, p. 133.

<sup>56</sup> B. LEGRAND, *L’offre obligatoire d’indemnité à la charge de l’assureur du responsable*, Presses Universitaires d’Aix-Marseille, 1985 ;A. FAVRE-ROCHEX, *Accidents de la circulation :procédures d’indemnisation*, *Gaz. Pal.*, 10 août 1994, p. 22 ;F. MAISONNEUVE, *La procédure d’offre*, in *Dixième anniversaire de la Loi Badinter*, n° spécial, *R.C.A.*, April 1996, p. 37; according to article. R. 211-59 of the *Code des assurances*, the insurer shall also send an explanatory memo to the victim explaining:

accepts the offer, the case will be settled<sup>57</sup> (the victim may within 15 days withdraw from the settlement)<sup>58</sup>.

- The driver is entitled to rely only on the inexcusable fault of the victim where the victim was the exclusive cause of the accident (except for victims below the age of 16 or over 70)<sup>59</sup>. The driver cannot invoke *force majeure* or the act of a third party as a defence against the victim.
- The fault of the driver leads to a limitation or an exclusion of the right to claim compensation for any damage suffered by him<sup>60</sup>.
- Third parties are entitled to claim compensation for any loss arising due to the damage caused to the immediate victim.
- The limitation period is ten years from the date of the injury.

The other well-known no-fault scheme is the special fund created by Act 91-1406 of 31 December 1991 in order to compensate persons infected with HIV as a result of a blood transfusion<sup>61</sup>.

The victim may claim compensation under Article 1147 of the civil Code, which provides for the award of damages in the event of the non-execution of a contract<sup>62</sup>. Liability is strict. As we have seen, it is no defence for the transfusion centre to allege that it was impossible to discover the defect in the blood at the time of its supply<sup>63</sup>. The victim can otherwise apply to the special compensation fund<sup>64</sup>. The plaintiff must establish infection by HIV by transfusion of blood products or injections

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- Who is entitled to compensation
  - The operation of the system of compensation
  - Who is bound to get in touch with the victim
  - That the victim will receive an appointment for a medical examination
  - The content of the offer
  - Who is entitled to receive the offer
  - When the victim will obtain compensation.

The injured party is examined by the insurer's medical expert. The victim may be (and should be) accompanied by his lawyer and/or his medical expert.

<sup>57</sup> J.-P. CHAUCHARD, *La transaction dans l'indemnisation du préjudice corporel*, R.T.D. civ. 1989, p. 1.

<sup>58</sup> T.G.I Nice, 15 May 1995, R.C.A. 1995, n° 235 and commentary by GROUDEL, n° 28 (the insurer must give notice that the victim has a right to cancel).

<sup>59</sup> G.LÉGIER, *La faute inexcusable de la victime d'un accident de la circulation régie par la loi du 5 juillet 1985*, D. 1986, chr. p. 97; J. ROVINSKI, *La faute inexcusable et exclusive du passager dans la loi du 5 juillet 1985*, Gaz. Pal. 12-13 February 1999, p. 2; Civ. 2<sup>e</sup>, 20 juillet 1987 (11 decisions), Gaz. Pal. 8 January 1988, commentary by CHABAS; E. BLOCH, *La faute inexcusable du piéton*, J.C.P. 1988.I.3328; Ass. plén., 10 November 1995, R.T.D. civ. 1996.187, commentary by JOURDAIN (drunken pedestrian, at night, wearing dark clothing, hitch-hiking in the middle of the road); Civ. 2<sup>e</sup>, 1<sup>st</sup> April 1998, R.C.A. 1998, n°239 (pedestrian lying in the road, at night, in foggy conditions).

<sup>60</sup> F. CHABAS, *La situation faite au conducteur fautif...*, Gaz. Pal., 2 February 1994, p. 8; Civ. 2<sup>e</sup>, 9 December 1992, R.C.A. 1993, n° 82; Civ. 2<sup>e</sup>, 3 February 1993, R.C.A. 1993, n° 162; Civ. 2<sup>e</sup>, 31 March 1993, R.C.A. 1993, n° 234; Civ. 2<sup>e</sup>, 2 April 1996, R.C.A. 1996, n°219; Civ. 2<sup>e</sup>, 1<sup>st</sup> April 1999, R.C.A.1999, n° 212.

<sup>61</sup> Y. LAMBERT-FAIVRE, *L'indemnisation des victimes post-transfusionnelles du sida :hier, aujourd'hui et demain*, R.T.D. civ. 1993, p. 1; Y. LAMBERT-FAIVRE, *Principes d'indemnisation des victimes post-transfusionnelles du SIDA*, D. 1993, chron. 67.

<sup>62</sup> T.G.I. Paris, 1<sup>st</sup> July 1991, J.C.P. 1991.II.21762, commentary by HARICHAUX; Paris, 28 November 1991, D. 1992, p. 85, commentary by DORSNER-DOLIVET; Toulouse 5 November 1991, Gaz. Pal., 24-25 September 1993, commentary by DORSNER-DOLIVET; Aix-en-Provence, 12 July 1993, D. 1994, p. 13, commentary by VIDAL.

<sup>63</sup> Civ. 1<sup>re</sup>, 12 April 1995 (two decisions), J.C.P. 1995.II.22467, commentary JOURDAIN; C.E., 26 May 1995 (three decisions), J.C.P. 1995.II.22467, commentary by MOREAU; Civ. 1<sup>re</sup>, 9 July 1996 (three decisions), D. 1996, p. 610, commentary by Y. LAMBERT-FAIVRE.

<sup>64</sup> Y. JOUHAUD, *L'indemnisation des transfusés et hémophiles victimes de contamination par le V.I.H. ; doctrine adoptée par la Commission du Fonds d'indemnisation*, Bull. cass., 1<sup>st</sup> October 1992; A. SOBEL, *Le Fonds d'indemnisation des victimes du sang contaminé*, R.F.D.C. 1993.3, p. 305; P. CASSON, *Les Fonds de garantie*, L.G.D.J., 1999.

of products derived from the blood. The Fund should compensate the victim for damage suffered within three months from the date on which the Fund received complete documentation in support of the alleged damage claim. The offer shall indicate the assessment made by the Fund in relation to each head of damage. There shall be full compensation for all pecuniary and non-pecuniary damage sustained by the direct and indirect victims of contaminated blood transfusions carried out in France. Three-quarters of the compensation due is payable upon diagnosis of the HIV infection, and one-quarter at stage IV of the illness, provided that the development of full-blown AIDS has been established.

Any proceedings against the Fund (where a claim has been rejected, there has been a failure to make an offer, or the victim has rejected an offer) must be brought before the Court of Appeal of Paris. When a victim accepts an offer from the Fund for full compensation, the victim is prevented from seeking further compensation for the same injury<sup>65</sup>.

### 1.3 *The right to claim compensation for personal injury and fatal accidents damages*

1) In principle, all rights and interests are protected. Article 1382 of the civil Code stipulates that the wrongdoer shall be bound to make reparation. The only limitation on this entitlement is that the right or interest must be legitimate in order to be protected under tort law<sup>66</sup>. The protection covers all rights and interests, and it is not required to prove the existence of a violated right, or of a legal tie<sup>67</sup>. The conditions for establishing civil liability are fault (where relevant), damage and causation. The question of damage is not at issue. Damage sustained has to be certain<sup>68</sup>, direct and personal to the plaintiff<sup>69</sup>.

2) The European Convention on Human Rights has been relied upon in the contaminated blood transfusion cases. In three cases<sup>70</sup>, despite the fact that the victims had accepted an offer of compensation for their injuries made by the special Fund, they decided to claim, before the court, for cumulative or additional compensation. The *Cour de cassation* decided that the acceptance of compensation from the Fund by the plaintiffs extinguished their right to make a civil claim. The European Court of Human Rights considered that the prohibition of the right to obtain a further remedy constituted a breach of Art. 6(1) of the European Convention (right to a fair trial)<sup>71</sup>.

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<sup>65</sup> Civ. 9 July 1996 (three decisions), *D.* 1996.610, commentary by Y. LAMBERT-FAIVRE.

<sup>66</sup> See article 31 of the *Nouveau code de procédure civile*; H. MAZEAUD, *La lésion d'un intérêt juridiquement protégé, condition de la responsabilité civile*, *D.* 1994, chron. 39 ff., Ch. mixte, 27 February 1970, *J.C.P.* 1970.II.16305, concl. LINDON, commentary by PARLANGE (claim by a concubine), J. VIDAL, *J.C.P.* 1971.I.2390.

<sup>67</sup> Civ. 2e, 4 March 1964, *Gaz. Pal.* 1964, 1,392; ESMEIN, *D.* 1954, Chron. 113 (compensation for *dommage moral*)

<sup>68</sup> BENABENT, *La chance et le droit*, 1973; BORÉ, *J.C.P.* 1974.I.2620; J. HUET, *R.T.D. civ.* 1986.117; JOURDAIN, *R.T.D. civ.* 1989. 85; Crim. 24 February 1970, *J.C.P.* 1970.II.16456 (loss of chance to obtain a good job); Civ. 2e, 9 November 1983, *J.C.P.* 1985.II.20360, commentary by LE TOURNEAU (loss of a chance to obtain increased earnings); Civ. 1re, 10 January 1990, *D.* 1990, I.R. 31 (loss of a chance to survive); Civ. 2e, 20 July 1993, *D.* 1993, 526, commentary by CHARTIER (AIDS); Crim. 4 December 1996, *Bull. Crim.*, n°445 (loss of a chance); Civ. 1re, 16 June 1998, *Bull. civ.* I, n°216 (*idem*); Civ. 1re, 8 July 1997, *Bull. Civ.* I, n°238 (negligent diagnosis and loss of a chance to improve the patient's condition).

<sup>69</sup> Crim. 10 May 1984, *D.* 1985. 25, commentary by PENNEAU; Crim. 9 February 1989, *D.* 1989. 614, commentary by BREUNEAU.

<sup>70</sup> *Affaire Bellet*, Civ. 2<sup>e</sup>, 26 January 1994, *Gaz. Pal.*, 24-26 July 1994, p.3, E.C.H.R., 4 December 1995, *D.* 1995.357, commentary by M. COLLIN-DEMUMIEUX; *Affaire Vallée*, C.E., 15 October 1993, *R.F.D. adm.*, May-June 1994, p. 553, E.C.H.R. 31 March 1992, *Affaire X vs. France*, *J.C.P.* 1992.II.21896, commentary by APOSTOLIDIS; *Affaire Engel*, Cass. Ass. Plén. 6 June 1997, *D.* 1998.255, concl. TATU, *R.C.A.* 1997, n°263; E.C.H.R., 30 October 1998, *R.C.A.* 1999, n°37.

<sup>71</sup> France was ordered to pay 100 000 F in the *Bellet* case, 200 000 F in the *Vallée* case and 1 000 000 F in the *Engel* case.

The European Court of Human Rights considered that it was reasonable for the victims to believe that they were entitled to begin or continue civil actions for damages in parallel with their applications to the Compensation Fund, even after the Fund's offer. The system was not sufficiently clear nor sufficiently attended by safeguards to prevent a misunderstanding as to the nature of the procedures for obtaining the available remedies and the nature of the restrictions stemming from following one or other of the possible causes of action. Having regard to all the circumstances of the cases, the Court found that the applicants did not have a practical, effective right of access to the courts in the proceedings before the Paris Court of Appeal. The European Court of Human Rights awarded further sums for both pecuniary and non-pecuniary damages.

3) The victim shall be placed in the same position that he would have been in had the accident not occurred. This principle is known as the “principe de réparation intégrale”<sup>72</sup>. Full compensation shall be awarded for all injuries and losses to legitimate interests suffered by the victim. The principles which apply in relation to losses caused by a breach of duty are: compensation for the whole injury; nothing but the injury<sup>73</sup>; and only the real injury<sup>74</sup>. Generally, the judge will declare that, having regard to Article 1382, a tortfeasor must make full reparation for the damage he has caused. Losses must be made good in their entirety, that is to say both material and non-material losses. The compensation must be proportionate to the damage suffered. Its assessment is traditionally based on objective considerations (medical expenses, loss of income, occupational disability, permanent total or partial incapacity) and subjective considerations (pain, aesthetic detriment and loss of amenity).

Compensation may be considered as “satisfactory”, since it is difficult to determine the intrinsic value of a non-economic injury (such as the loss of a limb or paralysis for example)<sup>75</sup>. The judge must decide what sum is adequate (exercising his discretion)<sup>76</sup>. However, the decision of the judge may be varied on appeal<sup>77</sup>. The judge may not follow pre-determined rules when making the assessment<sup>78</sup>. The judge may not award compensation for an injury for which the victim has not made a claim<sup>79</sup>, nor is he required to specify his evaluation of the damage when awarding a lump sum<sup>80</sup>.

Some authors have suggested that it is necessary to “improve the situation”, by requiring the judge to assess the damage sustained (by defining the heads of recoverable damage for example), instead of relying on personal feelings. According to this point of view, the main problem is the social cost (and more specifically the insurance cost) of the increasing awards for personal injuries<sup>81</sup>.

The recent implementation of the product liability directive, in 1998, is a good example of the continued application of the right to full compensation. The new statutory regime did not introduce

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<sup>72</sup> Civ. 2<sup>e</sup>, 28 oct 1954, *J.C.P.* 1955.II.8765, note SAVATIER (“*Le propre de la responsabilité est de rétablir aussi exactement que possible l'équilibre détruit par le dommage, et de placer la victime, aux dépens du responsable, dans la situation où elle se serait trouvée si l'acte dommageable n'avait pas eu lieu*”); Civ. 2<sup>e</sup>, 18 January 1973, *Bull. civ.* II, n° 27, p. 20; Civ. 2<sup>e</sup>, 19 November 1975, *Bull. civ.* II, n°302, p. 243; Civ. 2<sup>e</sup>, 9 July 1981, *Bull. civ.* II, n° 156, p. 101.

<sup>73</sup> Civ. 1<sup>re</sup>, 15 January 1957, *D.* 1957, 161; Crim. 15 mai 1984, *Bull. crim.* n° 176; Civ. 2<sup>e</sup>, 14 February 1985, *Bull. civ.* II, n°40, p. 28; Crim. 22 August 1995, *Bull. crim.* n° 266, p. 743.

<sup>74</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, 4<sup>th</sup> ed., Dalloz, 2000, n° 87.

<sup>75</sup> *Ibidem*, n°90.

<sup>76</sup> T. IVALINER, *Le pouvoir souverain du juge dans l'appréciation des indemnités*, *D.S.* 1972, chr. 1; Civ. 2<sup>e</sup>, 20 December 1966, *D.* 1967, 669, commentary by M. LE ROY; Civ. 2<sup>e</sup>, 20 February 1980, *Bull. civ.* II, n° 40, p. 29; Civ. 1<sup>re</sup>, 16 July 1991, *Bull. civ.* n° 249, p. 164; Civ. 2<sup>e</sup>, 8 June 1994, *J.C.P.* 1994.IV.2016, commentary by VINEY.

<sup>77</sup> The *Cour de cassation* does not consider “factual elements”, such as the assessment of the amount of damages.

<sup>78</sup> Crim., 4 February 1970, *D.* 1970, p. 333.

<sup>79</sup> Crim. 1<sup>st</sup> October 1997, *Gaz. Pal.*, 22-24 February 1998, p. 26.

<sup>80</sup> Ass. Plén. 26 March 1999, *J.C.P.* 1999.IV.1917, commentary by VINEY.

<sup>81</sup> G. VINEY, *Introduction à la responsabilité*, L.G.D.J., 1995.

any ceiling on the amount of recoverable damages, even though this was a permissible option under the directive. A move in such a direction would have constituted a reversal of the current approach of the judges in favour of the victim.

4) A recent statute of February 2002 has prohibited the possibility to bring an action for wrongful birth.

5) The protection afforded by the tortious and contractual liability regimes under French law are identical. The *Cour de cassation* sometimes does not state whether it is ruling pursuant to tort or contract law. The main differences concern remedies and limitation<sup>82</sup>. The *summa divisio*<sup>83</sup> between contract<sup>84</sup> and tort<sup>85</sup> liability is not really relevant, since no-fault liability has developed<sup>86</sup>. If the victim has a contractual right against the tortfeasor, he is not entitled to bring a separate claim in tort<sup>87</sup>. However, the *Cour de cassation* recently recognised the existence of a contractual liability for things<sup>88</sup>, thus limiting the significance of any distinction as far as compensation for personal injury is concerned. Furthermore where a tort also constitutes a crime (leading to the involvement of the criminal courts), and even though there is a contract between the two parties, the victim will be entitled to claim in tort<sup>89</sup>.

#### **1.4. The role of medical experts in personal injury compensation**

The first step towards obtaining compensation for personal injury is the obtaining of a report from a medical expert<sup>90</sup>. Court-appointed medical experts are common<sup>91</sup>. Nowadays, medical experts increasingly specialise in personal injury litigation, by graduating in “*réparation juridique du dommage corporel*”. The judge has a discretion when assessing damages, and is free not to appoint a medical expert<sup>92</sup>. However, at an assessment of damages, medical reports are almost always necessary, and doctors may be called to testify. In all personal injury claims, the wrongful conduct in question must be a cause of the injuries claimed. The burden of proof rests on the plaintiff (see Article 1315 of the civil Code). The evidence of the medical experts (whether contained in the report, or given in evidence before the court) is used to define the injuries and the cause of the injuries (the report represents, in the vast majority of cases, the proof of injury)<sup>93</sup>. On an assessment of damages, medical reports agreed between the plaintiff and the defendant are admissible in court.

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<sup>82</sup> The limitation period for an action in contractual liability is 30 years from the date the damage was suffered or the date the plaintiff become aware of the damage (article. 2262 Code civil; Soc. 18 April 1991) and for tortious actions ten years from the same date (article 2270-1 Code civil).

<sup>83</sup> G. DURRY, *La distinction de la responsabilité contractuelle et de la responsabilité délictuelle*, Centre de Recherche en Droit privé et comparé du Québec, Montréal, 1986 ;Ph. RÉMY, *La Responsabilité contractuelle :histoire d'un faux concept*, R.T.D. civ. 1997, p. 323 ;E. SAVAUX, *La fin de la responsabilité contractuelle ?*, R.T.D. civ. 1999, p. 1.

<sup>84</sup> Article 1146 and following of the civil Code.

<sup>85</sup> Article 1382 and following of the civil Code.

<sup>86</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, n°331.

<sup>87</sup> M. ESPAGNON, *Le non-cumul des responsabilités contractuelles et délictuelle*, thèse, Paris I, 1980 ;G. VINEY, *La responsabilité :conditions*, n° 161 to 245.

<sup>88</sup> Civ. 1<sup>re</sup>, 17 January 1995, D. 1995, p. 350, commentary by JOURDAIN.

<sup>89</sup> The *Cour de cassation* has ruled that criminal courts have no competence to decide on contractual matters.

<sup>90</sup> C. FOURNIER and M. OLIVIER, *L'expertise du dommage corporel*, R.F.D.C. 1989, p. 5 ;C. ROUSSEAU, *Le respect du contradictoire dans l'expertise*, R.F.D.C. 1991, p. 365 ;E; ATTAMIAN, *L'évaluation du dommage corporel :une spécialité médicale*, R.F.D.C. 1992, p. 455.

<sup>91</sup> Each year, lists of medical experts are drawn up. There is a national list drawn up by the *Bureau de la Cour de cassation* (“*experts agréés par la Cour de cassation*”), and a regional list drawn up by every Court of appeal (“*experts agréés près la Cour d'appel de...*”).

<sup>92</sup> Article 263 of the *Nouveau Code de procédure civile*.

<sup>93</sup> C. ROUSSEAU, *Choix des experts pour l'évaluation des dommages corporels*, R.F.D.C. 1983, p. 249, C. FOURNIER et C. ROUSSEAU, *Qualification et formation des experts dommage corporel*, R.F.D.C. 1986, p. 343.

The court is entitled to form its own view of the current and future disability of the victim described in the report; the judge is not bound by the findings in any medical report.

### **1.5. Personal injury Lawyers**

The Minister of Justice has established a list of “*spécialisations*”, based on the recommendation of the *Conseil national des barreaux*<sup>94</sup>. French lawyers may advertise to the public their “speciality” and may call themselves specialists in personal injury litigation.

## **2. Recoverable losses**

There are two main factors which are to be taken into account when assessing damages. First, there is the personal injury itself (the loss of a limb or some other part of the body, loss of pleasure of life...) (*préjudices non-économiques* or *préjudices personnels*) and, secondly, financial loss (*préjudices économiques*). There may be a loss of earnings in comparison with what the victim was earning prior to the accident and was likely to continue to earn, and in addition extra expenses such as nursing costs. The pain and extra expense should be measured over the period of the duration of the injury and no longer, whereas the loss of earnings and the enjoyment of life should be measured over the period for which the victim would have enjoyed the benefits but for the occurrence of the injury.

### **2.1. Pecuniary losses (past, actual and future)**

Damages are awarded for the injury actually sustained by the victim, and for all the consequential losses and expense which flow from the injury. Pecuniary loss may be classified under two different headings: the first concerns the loss of earnings and other benefits which the injured person would have received but for the accident (*lucrum cessans*); the second concerns the additional expenses incurred as a result of the accident. In principle, the measure of damages or pecuniary loss will reflect the exact amount of money which the victim has lost, or has spent, in consequence of the injury (the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened) (*damnum emergens*).

#### **2.1.1. Damnum emergens**

French law provides compensation for medical expenses incurred by the injured person in treating his condition and restoring him to health. Social security provisions enable the victim to obtain all his medical needs without the need to make any payment whatsoever<sup>95</sup>. There is a general principle of freedom of choice of doctor and hospital<sup>96</sup>. Therefore, the plaintiff is not bound to make use of free medical and hospital treatment, and if he receives treatment as a private patient at his own cost, the cost is recoverable and will be paid by the Social Security (up to 80%).

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<sup>94</sup> Decree of 27 November 1991, Art. 86.

<sup>95</sup> Loi n°99-641 of 17 July 1999, JO 28 July 1999 (*Couverture maladie universelle*); F. TAQUET, *Premières réflexions sur la loi du 27 juillet 1999...*, *Gaz. Pal.*, 21-23 November 1999, p. 21.

<sup>96</sup> Public hospitals are financed directly by the State (art. L.174-1 and f. *Code de la Sécurité sociale*). Expenses incurred by the victim in relation to hospital costs are paid up to 80% by social Security. The remaining 20% is paid by the victim (or more often by insurance) (article L.174-4 *Code de la Sécurité sociale*).

A plaintiff's damages cannot be increased if the size of his medical bill is dictated by his personal situation<sup>97</sup>. The items which may be claimed as medical expenses are many and diverse<sup>98</sup>. The costs of nursing care at home can also be claimed. A plaintiff is equally entitled to recover future expenses as well as those already incurred at the time the court makes its award<sup>99</sup>.

### 2.1.2. *Lucrum cessans*

The victim may be awarded compensation for temporary loss of earnings (*Incapacité temporaire totale*). Where the victim used to work, he will be compensated for any loss of earnings as a result of having to give up work<sup>100</sup>. The calculation of loss will be carried out by comparing the previous level of earnings and the level of earnings during the temporary incapacity (after deductions of sick payments and social Security benefits)<sup>101</sup>. Where the employer has continued to pay the victim, the former can recover the losses from the tortfeasor<sup>102</sup>. Damages can be awarded for the victim's loss of opportunity to gain a promotion in his career<sup>103</sup>. Even if the victim did not work at the time of the injury, compensation may not be precluded<sup>104</sup>.

### 2.1.3 *Loss of future earning capacity*

Loss of future earnings is generally the main item of financial loss. The judge has to contrast the position before and after the accident and estimate the difference. A future loss of earnings claim may be spread over many years and will almost certainly have varying rates of loss. Such a loss must then be turned into a single capital sum payable at the date of judgment. Any such loss of earnings may be total or partial, and for a limited period or continuing. Allowance must be made for the probability of an increase or reduction in the rate of earnings.

The *Déficit fonctionnel séquellaire*: the type of calculation used in France is the *calcul au point*<sup>105</sup>. The courts usually ask the experts to specify a percentage of incapacity, though only in an indicative way. Frequently, medical experts use unofficial scales<sup>106</sup>, but they may also use none at all and rely on their professional experience. The most commonly used scale in the courts is the "*barème fonctionnel indicatif des incapacités en droit commun*" published in *Le Concours médical* in 1982<sup>107</sup>.

The assessment depends upon a notional percentage of incapacity. Values are attributed to each percentage point of incapacity. The calculation ignores both the amount of the claimant's annual

<sup>97</sup> Tr. Chartres, 28 October 1938, *D.H.* 1939, 31.

<sup>98</sup> Soc. 28 April 1981, *Bull. civ. V*, n° 348, p. 261 and Soc. 16 January 1985, *Bull. civ. V*, n°33 (artificial limb) ; (transportation to and from hospital) ; Crim. 28 January 1969, *Bull. crim.*, n° 52, p. 116, Soc. 11 June 1980, *Bull. civ. V*, n° 515 (professional rehabilitation) ; Paris, 1<sup>st</sup> February 1973 (cost of a guide dog) ; Soc. 21 November 1984, *Bull. civ. V*, n° 528, p. 319 (adaptation of the home).

<sup>99</sup> Ass. plén., 9 June 1978, *Gaz. Pal.* 1978, 2, p. 557 ; Soc. 30 May 1973, *Bull. civ. V*, n° 354, p. 17 ; Civ. 2<sup>e</sup>, 20 June 1990, *Gaz. Pal.*, 28 December 1990, p. 19.

<sup>100</sup> Soc. 28 March 1984, *Bull. civ. V*, n° 115, p. 89 ; Civ. 2<sup>e</sup>, 7 February 1979, *Bull. civ. II*, n° 41 (compensation shall be awarded even where the victim kept on working but suffered psychological problems).

<sup>101</sup> The assessment may also be made by an expert (Civ. 2<sup>e</sup>, 16 June 1961, *Bull. civ. II*, n° 462, p. 330).

<sup>102</sup> Civ. 2<sup>e</sup>, 22 April 1966, *Bull. civ. II*, n° 467, p. 331; and article 16 of the special Statute on traffic accidents (loi 85-677 of 5 July 1985).

<sup>103</sup> Civ. 2<sup>e</sup>, 27 February 1985.

<sup>104</sup> For example in the case of a housewife: Colmar, 15 May 1956, *D.* 1956, p. 614 (reference will be made to the minimum statutory wage, the *Salaires Minimum de Croissance*).

<sup>105</sup> This method is however not compulsory: TGI Paris, 10 February 1981, *J.C.P.*, 1981.IV.379.

<sup>106</sup> See the scale published in 1980, in *Le Concours médical*, based upon the *Guides to the evaluation of permanent impairment*, of the American medical association. The scale was up-dated in 1993, published in *Le Concours médical*.

<sup>107</sup> Crim. 26 June 1984, *Bull. crim.* N°243 ; See M. LE ROY, *L'évaluation du préjudice corporel*, 15<sup>th</sup> ed., Litec, 2000.

earnings and the effect upon these earnings of the degree of incapacity in fact suffered by the claimant as a consequence of the injury. Reliance instead is placed upon tables which attribute a particular monetary value to each percentile of capacity for persons in various walks of life. The particular value appropriate to the claimant is then multiplied by the degree of incapacity, expressed in a percentage figure, which is attributed to the particular type of the injury the victim has suffered, and the resulting amount is the measure of the claimant's periodic loss. The courts sometimes modify the method due to considerations of age and of the severity of the injury. The *évaluation in concreto* is an alternative method of calculation which considers the circumstances of each case. Courts have considerable freedom in assessing the damages and should, according to some academics, "personalise" the evaluation. A percentage figure representing the victim's degree of incapacity is then applied to the claimant's annual earnings, and the resulting total gives his annual loss of earnings<sup>108</sup>.

## 2.2. Non-pecuniary losses

All matters which amount to a disturbance in one's living conditions may be the subject of a claim for compensation. Victims are entitled to recover damages not only for pecuniary but also non-pecuniary losses. There are no limits on the recoverability of non-pecuniary damages; Articles 1382 and following do not contain any restrictions in this respect. Thus, both pecuniary and non-pecuniary damages are recoverable so long as they are a direct and immediate consequence of the tortious act. Usually, courts award a global sum for the non-pecuniary loss but divide the award into specific categories of loss. The heads of recoverable loss are numerous and are described below.

### 2.2.1. Heads of recoverable loss

#### 2.2.1.1. Pain and suffering and loss of physical/mental integrity

##### *Pretium doloris*

The element of physical pain is placed within the category of *pretium doloris*<sup>109</sup>. It is recognised as an element of non-pecuniary loss. This item was fully established as a head of damages in awards made by the courts long before the more sophisticated head of *dommage moral* appeared. Both pain suffered in the past and any symptoms which are likely to continue into the foreseeable future are taken into account. However, it is often difficult for medical experts to assess future pain which is neither "chronic" nor "functional". Thus this head of compensation will normally cover the pain suffered during the period of temporary "traumatic" impairment<sup>110</sup>. This element may also include mental suffering, such as fright and any nervous reaction, the fear of future incapacity, mental anxiety, and neurosis<sup>111</sup>.

Here too, a scale is used, which specifies differing degrees of pain (very light, light, moderate, medium, quite severe, severe, very severe)<sup>112</sup>. It shall be noted that this head of damages is protected from the recoupment of benefits by the social Security<sup>113</sup>. The sums awarded under this head are rather modest (from 1000 € to 15 000 €).

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<sup>108</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, n°93.

<sup>109</sup> G. RIPERT, *Le prix de la douleur*, D. 1948, chr. 1.

<sup>110</sup> Id, n°139.

<sup>111</sup> Civ. 2<sup>e</sup>, 5 January 1994, J.C.P. 1994.IV.585.

<sup>112</sup> See the scale in Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, p. 271 ;in M. LE ROY, *L'évaluation du préjudice corporel*, p. 78.

<sup>113</sup> Loi n° 73-1200 of 27 December 1973.

### *Préjudice d'agrément* (loss of amenity)

The head of loss called *préjudice d'agrément* represents loss of amenity<sup>114</sup>. This head of claim applies even where the victim is in a vegetative state<sup>115</sup>. The courts have devised numerous sub-categories of loss of amenity within the scope of the head of *préjudice d'agrément*. According to the *Cour de cassation*, loss of amenity (*préjudice d'agrément*) results from the “loss of quality of life”<sup>116</sup>, which concerns not only the future impossibility of doing a particular activity or sport<sup>117</sup> and does not require specific proof that the victim had in fact carried out the sport or other activities prior to sustaining the injury<sup>118</sup>. Loss of amenity can incorporate a loss of sense of smell<sup>119</sup>, an unconsummated marriage<sup>120</sup>, the inability to go for a walk<sup>121</sup>, or carry heavy objects<sup>122</sup>. This injury is included within the head of damage known as *dommage moral*, and is different from mere physical injury<sup>123</sup>.

#### 2.2.1.2. *Temporary and permanent impairment*

The notion of “consolidation” is central to the assessment of different injuries. A distinction is drawn between the period of temporary impairment (*Incapacité temporaire totale*) and permanent impairment (*Incapacité permanente partielle* or *déficit fonctionnel séquellaire*). The non-economic loss suffered as a result of the temporary impairment is often neglected (only the economic aspect of the loss is considered). However, in two recent decisions, the *Cour de cassation* seems to take the temporary impairment into account<sup>124</sup>.

#### 2.2.1.3. *Aesthetic damage*

This element of loss is called *préjudice esthétique*<sup>125</sup>. Aesthetic damage may in effect constitute a separate injury in itself of some importance (leading to a loss of career, or causing the victim to avoid social occasions), or it can be a trivial mark left after a minor accident. In order to assess such damage, the medical expert applies a scale graduated from 0 to 7, which does not take into consideration the age and the sex of the plaintiff<sup>126</sup>. However, courts do take these elements into account, as well as the occupation of the victim and whether the victim is unmarried<sup>127</sup>. The *Cour de cassation* has ruled that compensation for aesthetic damage is due even where the victim was in a coma (and the coma was likely to last until the death of the victim)<sup>128</sup>. Whenever aesthetic damage

<sup>114</sup> L. CADIET, *Le préjudice d'agrément*, thèse, Potiers, 1983 ;P. JOURDAIN, *R.T.D. civ.*, 1995, 893.

<sup>115</sup> Civ. 2<sup>e</sup>, 22 February 1995 (two decisions), *J.C.P.* 1995.IV.1000 ;Civ. 2<sup>e</sup>, 28 June 1995, *J.C.P.* 1995.IV.2133.

<sup>116</sup> Civ. 2<sup>e</sup>, 19 March 1997, *D.* 1998, *Jur.*, 59, commentary by Y. LAMBERT-FAIVRE.

<sup>117</sup> Crim. 26 May 1992, *J.C.P.* 1992.I.3625, commentary by G. VINEY.

<sup>118</sup> Civ. 2<sup>e</sup>, 20 May 1978, *Bull. civ.* II, n° 131, p. 105 ;crim., 14 June 1978, *Gaz. Pal.* 1978, 2, 550, commentary by L.-H. THOMAS ;crim. 9 March 1982, *Bull. crim.* N° 71, p. 183.

<sup>119</sup> Civ. 2<sup>e</sup>, 25 February 1981, *Gaz. Pal.* 1981, 2, pan. 175, commentary by CHABAS ;Civ. 2<sup>e</sup>, 23 October 1985, *J.C.P.* 1986.IV.14.

<sup>120</sup> TGI Châlons-sur-Marne 16 March 1978, *Gaz. Pal.* 1978, 2, somm. 399.

<sup>121</sup> Civ. 2<sup>e</sup>, 11 October 1989, *Bull. civ.* II, n° 178, p. 91.

<sup>122</sup> TGI Paris, 10 February 1981, *Gaz. Pal.* 1981, 1, 309.

<sup>123</sup> Crim. 5 March 1985, *Bull. crim.* N° 105, 1<sup>o</sup>, p. 275.

<sup>124</sup> Civ. 2<sup>e</sup>, 30 September 1998 (two decision), *R.C.A.* 1998, n° 373 and 379 (“*Les troubles physiologiques subis par la victime au cours de la période d'incapacité temporaire constituent, indépendamment de la perte de revenus qui peut en résulter, un préjudice corporel de caractère objectif dont les juges ne peuvent refuser la réparation*”).

<sup>125</sup> M. GUIDONI, *Le préjudice esthétique*, thèse, Paris I, 1977 ;L. MELENNEC, *L'indemnisation du préjudice esthétique*, *Gaz. Pal.*, 5 nov. 1976, p. 2.

<sup>126</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., at 144.

<sup>127</sup> M. LE ROY, *L'évaluation du préjudice corporel*, cit., at 150.

<sup>128</sup> Civ. 2<sup>e</sup>, 10 december 1986, *Bull. civ.* II, n° 188, p. 126.

affects the ability to continue to carry on an occupation, the personal loss arising from the aesthetic damage resulting from the injury is distinguished from the economic loss. The latter will be compensated under the head of pecuniary losses (and included in the assessment of the degree of permanent incapacity).

#### 2.2.1.4. *Damage to sexual function*

Loss of sexual function is a factor in the assessment of non-pecuniary damage<sup>129</sup>. Impairment of sexual function and enjoyment and of the ability to have children gives rise to an entitlement to compensation. The loss is distinguished from loss of amenity<sup>130</sup>. It is also distinct from the degree of incapacity<sup>131</sup>. The loss can be only temporary<sup>132</sup>. According to some authors, this can lead to the victim being compensated twice: the first time through compensation for loss of amenity and the second through compensation for loss of sexual function<sup>133</sup>. The victim is not obliged to undergo any operation.

#### 2.2.1.5. *Loss of earning capacity, loss of congenial employment and loss of housekeeping ability*

As described above, any loss of earning capacity is compensated under the head of loss of pecuniary damages<sup>134</sup>. In relation to the loss of housekeeping ability, this will be compensated under the head of pecuniary damages for the extra expense incurred by reason of the injury<sup>135</sup>. Since the Law of 27 December 1973, any non-pecuniary loss of amenity must be compensated separately from any economic loss<sup>136</sup>. The courts have a broad conception of non-pecuniary loss, which has been defined as “the diminution of the pleasures of life, caused by the impossibility or the difficulty of participating in normal activities”<sup>137</sup>. This notion of non-pecuniary loss is included within the broad head of loss of amenity, and is distinct from the issue of incapacity, which falls under the head of pecuniary damage<sup>138</sup>.

#### 2.2.1.6. *Loss of life expectancy*

There is no separate head of damage for this loss. Courts may allow an increase in the damages where the victim has had his life expectancy reduced by the injury. However victims of HIV infection by blood transfusion are compensated for this specific head of damage. The full compensation provided by the special Fund covers disturbances in living conditions resulting from HIV transfusion and the advent of illness, including the reduction in life expectancy<sup>139</sup>.

#### 2.2.1.7. *Damages for spoiled holidays*

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<sup>129</sup> L. MELENNEC, *Le préjudice sexuel*, *Gaz. Pal.*, 2-3 November 1977, p. 1 ;M. BOURRIÉ-QUENILLET, *Le préjudice sexuel: preuve, nature juridique et indemnisation*, *J.C.P.* 1996.I.3986.

<sup>130</sup> Civ. 2<sup>e</sup>, 6 January 1993 and Crim. 18 November 1992, *R.C.A.* 1993, n° 75 and commentary by GROUDEL, n° 7 ;Civ. 2<sup>e</sup>, 5 January 1994, *R.C.A.* 1994, n° 117.

<sup>131</sup> Civ. 2<sup>e</sup>, 21 May 1997 and 18 June 1997, *R.C.A.* 1997, n° 288 (two decisions); Civ. 2<sup>e</sup>, 19 November 1998, *R.C.A.* 1999, n° 1 and 8.

<sup>132</sup> TI Saintes, 6 January 1992, *D.* 1993, somm. comm. 28, commentary by PENNAU: inability to have sexual relations for over two months.

<sup>133</sup> M. LE ROY, *L'évaluation du préjudice corporel*, cit., n° 152.

<sup>134</sup> See at 2.1.3.

<sup>135</sup> For example the expenses of a cleaner: see Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., n°119.

<sup>136</sup> Loi n° 73-1200 of 27 December 1973.

<sup>137</sup> Paris, 2 December 1977, *D.* 1978, p. 285, commentary by Y. LAMBERT-FAIVRE.

<sup>138</sup> Crim. 26 May 1992, *R.C.A.* 1992, n° 301; Paris, 3 May 1994, *D.* 1994, p. 516, commentary by Y. LAMBERT-FAIVRE.

<sup>139</sup> Y. LAMBERT-FAIVRE, *Principes d'indemnisation des victimes post-transfusionnelles du sida*, *D.* 1993, chr. p. 67 ;I. BESSIÈRES-ROQUES, *Le préjudice spécifique de contamination ;un nouveau préjudice?*, *R.F.D.C.* 1993, p. 79 ;Civ. 1<sup>re</sup>, 1<sup>st</sup> February 1995, *R.C.A.* 1995, n° 126, *R.T.D.civ.* 1995, p. 626, commentary by JOURDAIN.

This kind of injury is recoverable under the head of loss of amenity (*préjudice d'agrément*), and does not constitute a separate head of loss from other non-pecuniary losses<sup>140</sup>.

### 2.2.2. Protection of mental health: recoverable and non-recoverable losses

French courts deal with mental injury and related claims under the general heading of *dommage moral*. The question whether the harm caused had a physical or psychological impact is irrelevant: the courts do not consider the issue to be of any significance in the context of Article 1382 of the *Code civil*. Once liability for a tortious act has been established, the obligation to pay compensation arises. The French courts have a liberal attitude towards awarding damages for anguish suffered. The *pretium doloris* head of damage compensates both physical and non-physical suffering<sup>141</sup>. Compensation includes the mental suffering caused by the accident, including the fright of the accident and any mental reaction, any fear of future incapacity, whether in respect of physical or mental health or the capacity to earn...<sup>142</sup>. The anguish and upset felt when an animal is killed, or even hurt, is also recoverable<sup>143</sup>.

A person exposed to noise may claim non-pecuniary damages from the moment that the noise exceeds a certain level<sup>144</sup>. Such damage will be compensated under the tort of *trouble de voisinage*, liability for which is based on fault, under the general framework of Article 1382 of the *Code civil*. There are a considerable number of decisions concerning non-pecuniary loss and injury caused by noise, and the principle of compensation is soundly established<sup>145</sup>. A decree issued in 1988<sup>146</sup> included this type of tort within the definition of “contravention” (which constitutes a minor criminal offence).

There is no particular law which governs personal injury caused by pollution<sup>147</sup>. In the case of ecological disaster, where no physical or psychological injury has been suffered, a victim may nevertheless claim compensation for the anxiety suffered whether under the tort of *trouble de voisinage* or under the general cause of action for damage caused by things<sup>148</sup>, so long as the damage suffered was direct and certain.

### 2.2.3. Coma, vegetative condition and brain damage of the victim

<sup>140</sup> Nîmes, 19 May 1978, *Gaz. Pal.* 1980, I, somm. 186.

<sup>141</sup> Civ. 2<sup>e</sup>, 5 January 1994, *R.C.A.* 1994, n° 117.

<sup>142</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., n° 139.

<sup>143</sup> Civ. 2<sup>e</sup>, 16 January 1962, *D.* 1962, 199, commentary by RODIÈRE ; *J.C.P.* 1962.II.12557, commentary by ESMEIN (*Lunus* decision, concerning the killing of a horse) ; TGI Caen, 30 October 1962, *D.* 1963, p. 92 ; Rouen, 16 September 1992, *D.* 1993, p. 353, commentary by MARGUÉNAUD (killing of a dog).

<sup>144</sup> Civ. 2<sup>e</sup>, 14 December 1966, *D.* 1967, 197 ; Civ. 3<sup>e</sup>, 3 November 1977, *D.* 1978, 434, commentary by CABALLERO ; Civ. 3<sup>e</sup>, 24 October 1990, *J.C.P.* 1990.IV.417.

<sup>145</sup> Civ. 3<sup>e</sup>, 3 January 1969, *J.C.P.* 1969.II.15920, commentary by MOURGEON (noisy neighbours) ; Civ. 3<sup>e</sup>, 30 November 1988, *D.* 1988, I.R. 297 (proximity of a school) ; Versailles 4 July 1986, *D.* 1986, I.R. 476 (dogs barking)...

<sup>146</sup> Décret n° 88-523 of 5 May 1988 (“*relatif aux règles propres à préserver la santé de l’homme contre les bruits de voisinage*”), modified by Décret n° 95-408 of 18 April 1995 (“*relatif à la lutte contre les bruits de voisinage et modifiant le Code de la santé publique*”).

<sup>147</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., n° 697 ; G. VINEY, *Les principaux aspects de la responsabilité civile des entreprises pour atteinte à l’environnement en droit français*, *J.C.P.* 1996.I.3900 ; J. HUET, *Le développement de la responsabilité civile en droit de l’environnement en France*, *R.I.D. comp.* 1993, p. 235 ; G. VINEY, *Le préjudice écologique*, *R.C.A.*, May 1998, chr. p. 6.

<sup>148</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., n° 698.

A primary victim in a coma is entitled to recover damages for both temporary incapacity (as a head of pecuniary damage) and the “personal” injury (including non-pecuniary losses)<sup>149</sup>. The victim is compensated for the loss of the amenities of life during the coma<sup>150</sup>. Pain and suffering, aesthetic damage and loss of amenity are also recoverable even though the plaintiff does not have any capacity to feel (the principle was first accepted by the *Chambre criminelle* and then by the second *Chambre civile*)<sup>151</sup>. It is presumed that the gravity of the vegetative state in itself gives rise to real injury<sup>152</sup>.

#### 2.2.4. Role of medical experts in assessing non-pecuniary losses

There is a distinction between the medical assessment of the injury and the legal assessment<sup>153</sup>. The medical experts use tables, both for pecuniary damages (*barèmes d’incapacité*) and non-pecuniary losses (*échelles de préjudices moraux*). The function of the medical expert is only to give indications about factual matters (*questions de fait*) and not to evaluate the injury.

According to Article 265 of the *Nouveau code de procédure civile*, the role of the expert is delimited by the document issued by the judge (*mission d’expertise*). There are model forms of *mission d’expertise* which set out suggested ways of assessing different injuries. The most recent is the *mission-type* of the *Association pour l’étude de la réparation du dommage corporel*<sup>154</sup>, which is used mostly by insurance companies, and the *mission d’expertise judiciaire handicapés graves-troubles locomoteurs*, which was drawn up by a commission of insurers (*Fédération française des sociétés d’assurance*) and judges<sup>155</sup>. Such documents are not compulsory but the medical expert must follow any instructions given to him by the judge.

#### 2.2.5. The quantum of non economic damages

In the field of civil liability, the courts have a discretionary power when assessing damages<sup>156</sup>, but must take into account all the heads of damages<sup>157</sup>, even though it is not necessary to specify in any detail the basis of the assessment<sup>158</sup>. However the power of the judge is limited to the extent of the plaintiff’s claim<sup>159</sup>.

##### 2.2.5.1 Limits on the judges’ discretion

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<sup>149</sup> See Civ. 2<sup>e</sup>, 10 December 1986, *Bull. civ.* II, N° 188, p. 126: compensation for pain and suffering (*pretium doloris*), and aesthetic damage (*préjudice esthétique*).

<sup>150</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., n° 151.

<sup>151</sup> S. GROMB, *De la conscience dans les états végétatifs et de l’indemnisation*, *Gaz. Pal.*, 3 July 1991, p. 7; *Crim.*, 3 April 1978, *D.* 1979, I.R. 64, commentary by LARROUMET; Civ. 2<sup>e</sup>, 22 February 1995, *D.* 1995, *som. com.*, commentary by MAZEAUD, *R.T.D.civ.* 1995, commentary by JOURDAIN (no head of damages can be excluded simply because the victim is in a vegetative state).

<sup>152</sup> Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, n° 150; M. LE ROY, *L’évaluation du préjudice corporel*, n° 140.

<sup>153</sup> H. MARGEAT, *La place de l’expertise médicale dans l’indemnisation*, *R.F.D.C.* 1983, p. 1; R. BARROT, *Le rôle du médecin et le rôle du juge dans l’indemnisation du dommage corporel*, *R.F.D.C.* 1983, p.24.

<sup>154</sup> C. ROUSSEAU, *La mission d’expertise droit commun, 1994*, *Gaz. Pal.*, 19-21 February 1995, p. 2.

<sup>155</sup> *Mission d’expertise judiciaire handicapés graves, troubles locomoteurs*, circulaire F.F.S.A., n° 29/1995.

<sup>156</sup> Civ. 2<sup>e</sup>, 20 December 1966, *D.* 1967, 669, commentary by LE ROY; Civ. 1<sup>re</sup>, 16 July 1991, *Bull. civ.* n° 249, p. 164.

<sup>157</sup> *Crim.* 20 January 1987, *Bull. crim.* N° 25, p. 59.

<sup>158</sup> *Com.* 23 January 1973, *Bull. civ.* IV, n° 34, p. 29; *Crim.* 24 May 1982, *Bull. crim.* n° 131; *Ass. Plén.*, 26 March 1999, *Bull. civ.* n° 3.

<sup>159</sup> *Crim.* 3 November 1955, *D.* 1956, 557; *Crim.* 6 December 1983, *Bull. crim.* N° 329, p. 851; *Crim.* 22 March 1995, *Bull. crim.* N° 119, p. 344.

Courts have a broad power in this field and often award a global sum which represents the total compensation for all the injuries suffered<sup>160</sup>. When drawing up the report to be used by the judge, the medical expert often applies his personal experience rather than using tables. The tables available are issued by private bodies.<sup>161</sup> There is no table with any statutory or judicial authority indicating the appropriate level of awards<sup>162</sup>. When assessing the amount of compensation to be awarded, the court is able to refer to its former decisions in similar cases or to other courts' decisions<sup>163</sup>. This method has been accepted by the *Cour de cassation*<sup>164</sup>. Yet the *Cour de cassation* has also stated that courts cannot rely on pre-established rules in order to ground their decisions<sup>165</sup>.

A private body (*l'Association pour la Gestion des Informations sur le risque automobile*: AGIRA) periodically publishes a table establishing the average of the point's value, which is available on a nation-wide intranet system (*Minitel*). This publication was established as a result of the Act of 1985 dealing with compensation for road accidents<sup>166</sup>. However, there is little information about this publication and its methodology is often criticised<sup>167</sup>.

The absence of compulsory tables permits the judge and the medical expert to "personalize" matters in individual cases and to award higher compensation in given circumstances.

#### 2.2.5.2. How does the judge use his discretionary power

When awarding damages, the judge has only to respect the principle of full compensation<sup>168</sup>. The *Cour de cassation* does not control the exercise of the judge's discretionary power in the assessment of damages<sup>169</sup>. The judge may decide to assess the individual loss according to the method of *évaluation in concreto*. The judge usually divides the victim's loss into named categories (although there is no obligation to do so), and even though in the great majority of cases he will award a global sum for the total non-pecuniary loss<sup>170</sup>. The judge's discretion is limited to the extent of the victim's claim<sup>171</sup>. The judge cannot award a sum higher than the one claimed by the victim. He can however lower or increase the sum awarded for a single head of damages<sup>172</sup>. The award cannot be determined by reference to the social, cultural or financial status of the victim<sup>173</sup>. In the case of

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<sup>160</sup> The court can declare a single award "*représente la réparation intégrale du dommage*" (see. Civ. 2<sup>e</sup>, 9 December 1954, *Bull. civ. II*, n° 409, p. 274 ;Paris, 12<sup>e</sup> Ch., 13 December 1956, *Gaz. Pal.* 1957, I, 85 ;Ass. plén. 26 March 1999, *Bull. civ.*, n°3).

<sup>161</sup> See for example the table issued by *Le Concours médical*, in 1980, based on the *Guides to the evaluation of permanent medical impairment* issued by the American medical association. This table is the most frequently used by courts and medical experts when assessing the impairment of an injured person (see TGI Paris, 16 November 1981, *Gaz. Pal.*, 12 December 1981, p. 9).

<sup>162</sup> See M. LE ROY, *L'évaluation du préjudice corporel*, cit., at 51.

<sup>163</sup> The court will refer to the value of the point in similar cases.

<sup>164</sup> Soc., 12 December 1958, *Bull. civ. IV*, n° 1358, p. 1044; in 1999, the value of the point was of 460 € for the lowest and 3800 € for the highest, depending on the age of the victim and the percentage of incapacity.

<sup>165</sup> Crim. 4 February 1970, *D.* 1970, p. 333.

<sup>166</sup> Law 85-677 of 5 July 1985, article 26.

<sup>167</sup> M. QUENILLET, *L'indemnisation du préjudice corporel : un droit à la dérive?*, *J.C.P.* 1994.I.3770.

<sup>168</sup> T. IVANIER, *Le pouvoir souverain du juge dans l'appréciation des indemnités*, *D.S.* 1972, chr. 1 ;Civ. 2<sup>e</sup>, 8 June 1994, *J.C.P.* 1994.IV.2016, commentary by VINEY, *J.C.P.* 1994.I.3809

<sup>169</sup> Ass. Plén. 26 March 1999, *J.C.P.* 1999.IV.1917, commentary by VINEY, *J.C.P.* 2000.I.1999 (the Court of Appeal does not have to specify every single head of damages in its decision).

<sup>170</sup> Courts are nevertheless prepared to award separate sums for each category; see the decision quoted at note 171.

<sup>171</sup> Crim., 1<sup>st</sup> October 1997, *Gaz. Pal.* 22-24 February 1998, p. 26.

<sup>172</sup> Soc. 7 October 1987, *Bull.* n° 528.

<sup>173</sup> The award for *dommage moral* to a claimant is not "*une fonction de la situation de fortune ou de la situation sociale*" and "*ne peut être appréciée par le tribunal que forfaitairement sans jamais tenir compte d'une situation sociale*" (Tribunal correctionnel de Lille, 28 March 1962, *D.* 1962, J. 431; see M. LE ROY criticising the decision of a Court of appeal who took into account the earnings of the victim when assessing non-pecuniary damages (CA Aix, 20 December 1968, *Gaz. Pal.* 1969, 2, 221, commentary by J.-G.-M.), in *L'évaluation du préjudice corporel*, at 136.

multiple injuries, an assessment will first be made in relation to the most serious injury, to which a percentage of incapacity will be ascribed. The percentage of incapacity of the other injuries will be then be calculated by reference to the remaining capacity<sup>174</sup>.

Where the victim has already suffered from a pre-existing injury or condition, the judge must assess the situation of the victim *in concreto*<sup>175</sup>. If the victim was able to continue to work after the first injury, the incidence of the later injury may lead to a finding of total incapacity: where a person who had suffered injury to one eye had continued to work and, as a result of further injury, became completely blind, compensation will be awarded for an incapacity of 100 %, even though the capacity had already been reduced by the first injury<sup>176</sup>. The *Cour de cassation* had held in such cases that the new injury leads to a new invalidity rather than to an aggravation of the former one<sup>177</sup>.

Compensation awarded at the date of the court's decision may not be complete for two reasons. Where a plaintiff fails to include a claim for an injury in the original proceedings, the *Cour de cassation* permits a second claim to be brought with the purpose of obtaining compensation for the injury which was not included in the first claim<sup>178</sup>. Secondly, if the plaintiff's health deteriorates, then a further claim may be brought for non-pecuniary loss suffered. The judge must evaluate only the aggravation of the plaintiff's health rather than assessing the whole injury and reducing the compensation by the amount awarded in the first claim<sup>179</sup>.

The amount of damages awarded by the court represents the compensation due for all the injury and loss suffered and nothing other than the injury: there are no punitive damages. The amount of compensation cannot depend upon the degree of fault of the defendant. However, some academics do sometimes refer to the penalty function of civil liability<sup>180</sup>.

### 2.3 Lump sums, periodical payments, interim payments

The judge has a discretionary power to award a lump sum or periodical payments<sup>181</sup>. The sum can be divided into two parts: one part to be given by means of a lump sum and the other by means of periodical payments<sup>182</sup>. The judge is not bound by the plaintiff's claim (he can award periodical payments even though the plaintiff has asked for a lump sum<sup>183</sup>). Periodical payments are usually preferred where the plaintiff is a minor or suffers the consequences of serious incapacity as a result of the injury. Since 1974, periodical payments can be index-linked<sup>184</sup>. Indexation is compulsory

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<sup>174</sup> If the first injury leads to an incapacity of 40 %, the capacity remaining will be 60 %; if the second injury leads to an incapacity of 20 %, this is calculated as 20 % of 60 %, hence 12 %; total incapacity will be 40 + 12 = 52 %, and so on...

<sup>175</sup> Civ. 2<sup>e</sup>, 10 November 1965, *Bull. civ. II*, n° 868, p. 617; Civ. 2<sup>e</sup>, 20 December 1966, *DS* 1967, I, 669, commentary by M. LE ROY.

<sup>176</sup> Civ. 2<sup>e</sup>, 19 July 1966, *J.C.P.* 1966.II.14902, commentary by MEURISSE.

<sup>177</sup> Civ. 2<sup>e</sup>, 6 May 1987, *J.C.P.* G 1987.IV.235.

<sup>178</sup> Ass. plén., 9 June 1978, *Gaz. Pal.* 1978.2.557; Civ. 2<sup>e</sup>, 5 January 1994, *R.T.D.civ.* 1994, p. 619, commentary by JOURDAIN; *Crim.*, 23 June 1995, *Bull.* N° 219, p. 550.

<sup>179</sup> Civ. 2<sup>e</sup>, 29 October 1968, *R.T.D.civ.* 1969, p. 342, commentary by DURRY; Civ. 2<sup>e</sup>, 22 April 1971, *R.T.D.civ.* 1972, p. 144, commentary by DURRY; Civ. 2<sup>e</sup>, 7 July 1993, n° 333, commentary by GROUTEL; Civ. 2<sup>e</sup>, 11 January 1995, *R.C.A.* 1995, n° 94.

<sup>180</sup> S. CARVAL, *La responsabilité civile dans sa fonction de peine privée*, L.G.D.J. 1995.

<sup>181</sup> Civ. 2<sup>e</sup>, 17 February 1972, *Bull. civ. II*, n° 50 p. 36; Civ. 2<sup>e</sup>, 13 June 1979, *Bull. civ. II*, n° 178, p. 124.

<sup>182</sup> CA Paris, 11 May 1968, *Gaz. Pal.* 1968, 2, 118.

<sup>183</sup> *Crim.* 19 June 1996, *Bull. crim.* n° 261, p. 785.

<sup>184</sup> Ch. Mixte, 6 November 1974 (two decisions), *Gaz. Pal.*, 4-5 December 1974; Law of 27 December 1974, modified by Law of 5 July 1985, articles 43 and 44; H. MARGEAT, *Indexation et revalorisation des rentes droit commun*, *R.G.A.T.* 1975.5; M. LE ROY and H. MARGEAT, *Indexation et revalorisation des rentes droit commun allouées en réparation d'un accident*, *Gaz. Pal.* 1975, 1, 131.

only in respect of road traffic accidents claims<sup>185</sup>. The cost of the revaluation in the field of road traffic accidents is borne by the State. The award may also be turned into capital, by applying an earnings ratio (“*taux de capitalisation*”)<sup>186</sup>. There is no general rule as to the choice between a lump sum and periodical payments, and it mostly depends on the age and the incapacity of the plaintiff. Nevertheless, courts are more accustomed to making global awards.

### 3. Taxation

In the field of personal injury awards, two types of tax can be considered: wealth tax (*l'impôt de solidarité sur la fortune*) and income tax (*l'impôt sur le revenu des personnes physiques*). A lump sum awarded in a personal injury case is not taxable in itself (thus not subject to the *impôt de solidarité sur la fortune*)<sup>187</sup>, whereas interest earned on the damages are subject to taxation (*impôt sur le revenu des personnes physiques*). Periodical payments (*rente indemnitaire*) are subject to income tax following two decisions of the *Conseil d'État*<sup>188</sup>. There is an exception where the plaintiff suffers total and permanent incapacity<sup>189</sup>.

### 4. Private insurance, life insurance and deductions from personal injury awards

If the victim has the benefit of insurance (life insurance or personal injury insurance), the sum received will be prescribed in the insurance policy (this is the situation where the plaintiff has subscribed to a specific capital fund managed by the insurance company).<sup>190</sup> In such a case, there is no subrogation of the sums paid out to the plaintiff's rights<sup>191</sup>. Therefore the plaintiff will still be able to claim full compensation against the party at fault since the sum he has received from the insurance company was due, and provided for in the contract<sup>192</sup>.

According to article 33 of the Law of 5 July 1985<sup>193</sup>, there is a subrogation of the insurer to the plaintiff's right against the party at fault where the sums received by the plaintiff are considered to be sums which have been advanced. The subrogation is usually provided for by the insurance contract and the insurance company is not entitled to recover any monies due until the plaintiff has been compensated. If there is no third party to blame, the plaintiff will be compensated by the insurance policy and no subrogation will lie. If there is a finding of contributory fault on the part of the plaintiff, this does not affect the sum he is entitled to receive under the insurance contract.

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<sup>185</sup> The revaluation of periodical payments in road traffic accidents refers to the coefficient used by article L. 434-17 *Code de la Sécurité sociale*: This is an annual legal coefficient of revaluation which applies to substitute earnings after accidents at work.

<sup>186</sup> This earnings ratio is to be found in the Decree n° 86-973 of 8 August 1986 *fixant les modalités de conversion en capital d'une rente consécutive à un accident*, *Journal Officiel* of 22 August 1986, p. 10195, D. 1986, L. 461. However the judge may choose other more recent ratios (See Y. Lambert-Faivre, *Droit du dommage corporel*, at 124).

<sup>187</sup> See Response of the Ministry of Treasury, *Journal Officiel de l'Assemblée Nationale* 17 February 1986, p. 616; Question *Ecrite* n° 77155, 25 November 1985.

<sup>188</sup> C.E. 18 May 1936, n°48-287, *Rec. C.E.*, p. 558; C.E. 10 December 1943, n°72-089, *Rec. C.E.*, table p. 642; see also *Journal Officiel de l'Assemblée Nationale* 24 July 1971, p. 3769, n° 17667, 14 April 1971.

<sup>189</sup> Art. 81.9 *bis Code Général des Impôts*: “...les rentes viagères servies en représentation de dommages-intérêts en vertu d'une condamnation prononcée judiciairement pour la réparation d'un dommage corporel ayant entraîné pour la victime une incapacité permanente totale l'obligeant à avoir recours à l'assistance d'une tierce personne pour effectuer les actes ordinaires de la vie”. The principle of exemption applies also to transactions concerning road traffic accidents (*circulaire du ministère des Finances* of 1<sup>st</sup> December 1988).

<sup>190</sup> See article L. 131-1 *Code des assurances*: “En matière d'assurance sur la vie et d'assurance contre les accidents atteignant les personnes, les sommes assurées sont fixées par le contrat”.

<sup>191</sup> See article L. 131-2, al. 1 *Code des assurances*: “Dans l'assurance de personnes, l'assureur, après paiement de la somme assurée, ne peut être subrogé aux droits du contractant ou du bénéficiaire contre des tiers à raison du sinistre”.

<sup>192</sup> See Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, cit., at 309.

<sup>193</sup> Article 211-15 *Code des assurances*.

## 5. Social security systems and deductions from personal injury awards

The Social Security system, first enacted in 1945<sup>194</sup>, provides for substantial income replacement benefits, up to a reasonably high proportion of the amount of lost wages. A large percentage of medical treatment and hospital care costs are paid directly by the appropriate Social Security institution. Non-pecuniary losses remain outside this specific scheme. Where no person is liable, the victim will be compensated by the Social Security system. Although the Social Security system provides an injured person with only limited compensation, the victim will be automatically and immediately indemnified for the injuries he has suffered. The law of 27 July 1999<sup>195</sup> (integrated into the *Code de la sécurité sociale* at article L.380.1) provides everyone with an entitlement to medical care, even for the poorest victims (that is to say even for victims who have not earned sufficiently to be liable to pay social contributions).

After an injury has occurred, the benefits from the social security funds are of two types<sup>196</sup>. First, medical expenses (such as hospital fees, the cost of medicines and drugs, treatments, transportation to and from hospital) are paid directly by the competent social security body (*caisse de sécurité sociale*). The percentage of the fees paid by the social security fund depends upon the type of medical expense. The residual amount left to be paid by the injured person is called the “*ticket modérateur*”. Generally injuries which give rise to significant medical expense are completely covered by the social security payments. As regards hospital fees, the social security fund from which the injured person depends will pay directly to the hospital 80% of the total expense. The remaining *ticket modérateur* amounting to 20% will be paid by the patient (the same rule applies to public as well as private hospitals). The latter also has to pay a further sum (for daily services such as food) which amounts to a little more than 10 € per day. Specific rules apply when the injury occurred at a workplace. Hospital benefits are paid up to 100 % under the work accident system if the injury occurred at the work place.

Secondly, the Social security system has a fund for the purposes of sickness payments where the injury has suffered a loss caused by days off work<sup>197</sup>. Any employee involved in an accident at work has a right to be compensated for the incapacity resulting from the injury. If the injury leads to less than 10% of incapacity, the victim will be awarded a lump sum<sup>198</sup>. Where the incapacity is greater than 10%, any compensation will consist of periodical payments<sup>199</sup>.

The social security bodies are the principal third-party payers entitled to recover expenses sustained through subrogation. According to article 29 Law of 5 July 1985, the expenses which the social security body is entitled to recover are those dealt with above: hospital fees, drugs, treatments<sup>200</sup> and sickness benefits<sup>201</sup>. So far as compensation for non-pecuniary losses is concerned, these are beyond the scope of the right of subrogation<sup>202</sup>. Non-pecuniary losses are not covered by social security benefits. However, before 1973, the subrogation right concerned the whole amount of

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<sup>194</sup> See Ordonnance of 4 October 1945 and recently, Loi n° 99.641 of 27 July 1999 (Loi portant création d'une couverture maladie universelle), *Journal Officiel* 28 July 1999 ; J.-P. CHAUCHARD, *Droit de la Sécurité sociale*, L.G.D.J., 2d ed., 1998 ; J.J. DUPEYROUX and R. RUELLAU, *Droit de la Sécurité sociale*, Dalloz, 13<sup>th</sup> ed. 1998; D.C. LAMBERT, *L'Etat providence en question*, Economica, 1990.

<sup>195</sup> Loi n° 99-641 of 27 July 1999, *Journal Officiel* of 28 July 1999 ; F. TAQUET, *Premières réflexions sur la loi du 27 juillet 1999*, *Gaz. Pal.*, 21-23 November 1999, p. 21.

<sup>196</sup> Articles L.321-1 and R. 321-1 *Code de la sécurité sociale*.

<sup>197</sup> See Articles L. 323-1 and R. 323-1 *Code de la sécurité sociale*.

<sup>198</sup> Ass. plén., 8 February 1993, *J.C.P.* éd. C.I. 1993.II.455, commentary by Y. SAINT-JOURS.

<sup>199</sup> Soc. 26 May 1994, *D.* 1994, I.R. 151.

<sup>200</sup> See Art. 29-3, Law of 5 July 1985.

<sup>201</sup> See Art. 29-5, Law of 5 July 1985.

<sup>202</sup> J. BEDOURA, *Les incidences de la loi du 27 décembre 1973 sur les concepts traditionnels relatifs au préjudice*, *D.* 1980, chr. p. 139 ; Y. LAMBERT-FAIVRE, *Les droits de la victime et les recours de la Sécurité sociale*, *J.C.P.* 1998.I.110.

compensation: it was not unusual to see a victim left without compensation after the subrogation recourse (especially when there was contributory fault on the part of the plaintiff). The law of 27 December 1973 limited the right of recourse, by excluding non-pecuniary losses (for example *préjudice d'agrément, préjudice esthétique, pretium doloris*). Nevertheless, non-pecuniary losses (such as the *incapacité fonctionnelle*) are often included in the determination of the general incapacity percentile (*Incapacité personnelle permanente*), which also covers pecuniary losses (which are subject to a right of subrogation). Therefore a share of non-pecuniary losses will still be the subject to the third-party payer's right of recourse (even though these losses have not been compensated by the Social Security body)<sup>203</sup>.

## 6. Lawyer's fees and personal injury awards

In addition to the costs of the expert, the victim will incur lawyers' fees. The lawyer is free to fix his level of charges<sup>204</sup>. However, the French system does not permit contingency fee agreements<sup>205</sup>. The lawyer and his client will agree the level of fees before any trial<sup>206</sup>. Although contingency fees are forbidden, it is possible to provide in the contract for an additional payment depending upon the outcome at trial (these additional fees are called "*honoraires de résultat*"). The additional fees must be predetermined in the contract between the lawyer and his client<sup>207</sup> and are due only where the lawyer's work was of a particular standard<sup>208</sup>. The extra-payment may amount to between 10 % and 20 % of the total amount of compensation<sup>209</sup>.

In relation to the payment of lawyer's fees, various mechanisms are possible. The lawyer and his client may, after formal agreement, ask the insurer to pay the fees and such a sum will be subtracted from the total amount of compensation paid. Insurance companies sometimes transfer a global sum of compensation to the lawyer's account (each lawyer has a special account called *CARPA*: *Caisses de règlement pécuniaire des avocats*) who then compensates his client after the deduction of his fees. However, the plaintiff may ask to receive any compensation direct from the tortfeasor or his insurer.

According to article 700 of the *Nouveau code de procédure civile*, the winner's costs are to be paid by the loser, but it is rather unusual for the plaintiff to recover in full all his lawyer's fees<sup>210</sup>.

When the lawyer's fees are already fixed by contract, it is easier to include them in the head of pecuniary loss, thus obtaining full compensation for this expense<sup>211</sup>.

## 7. Foreign victims claiming in France

Liability depends on the law of the place where the wrongful act (or omission) occurred<sup>212</sup>. Therefore the French judge may apply foreign law where the plaintiff is French, for example where

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<sup>203</sup> For criticism, see Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, at 156.

<sup>204</sup> FLÉCHEUX, *La rémunération des prestations de service de l'avocat*, *Gaz. Pal.* 1998, doct., p. 192 ; B. BLANCHARD, *La fixation et le recouvrement de l'honoraire d'avocat d'après la jurisprudence récente*, *Gaz. Pal.* 21-22 March 1997, p. 3 ; Y. LAMBERT-FAIVRE, *La victime d'un dommage corporel et son avocat*, *Gaz. Pal.* 1999, 2, p. 1272.

<sup>205</sup> Civ. 1<sup>re</sup>, 4 July 1972, *D.* 1973.249, commentary by BRUNOIS.

<sup>206</sup> See Art. 10 Law of 31 December 1971, modified by Law n°91-647 of 10 July 1991.

<sup>207</sup> Civ. 1<sup>re</sup>, 17 October 1995, *Gaz. Pal.* 18 November 1995, commentary by DAMIEN; Civ. 1<sup>re</sup>, 3 March 1998 (two decisions), *J.C.P.* 8 April 1998, *actualités*, commentary by MARTIN.

<sup>208</sup> Civ. 1<sup>re</sup>, 7 March 1995, *J.C.P.* 1995.IV.1092.

<sup>209</sup> See Y. LAMBERT-FAIVRE, *Droit du dommage corporel*, at 111.

<sup>210</sup> Here the judge has a discretionary power ; see B. BOCCARA, *La condamnation aux honoraires*, *J.C.P.* 1976.I.2828 ; S. DAVY, *La répétibilité*, *Gaz. Pal.* 10-11 September 1999, p. 49.

<sup>211</sup> Although some liability insurers agree to pay the lawyers' fees, this does not happen as a matter of course.

<sup>212</sup> Civ. 3 January 1963, *D.* 1963, 241, commentary by HOLLEAUX; Civ. 30 May 1967, *Rev. crit.* 1967, 728, commentary by BOUREL.

an accident occurred in Germany the applicable law will be German<sup>213</sup>. There are no differences in the application of the law of damages on the basis of the nationality of the plaintiff.

## II. LIMITATION AND COMMENCEMENT OF PROCEEDINGS

### A. Limitation periods

1. The first period of limitation upon the expiry of which the claim is barred is the contractual one (thirty years). According to article 2262 of the *Code civil* “*Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d’en apporter un titre, ou qu’on puisse lui opposer l’exception déduite de la mauvaise foi*”.

There is also a general provision applicable to cases of tort of ten years : “*Les actions en responsabilité civile extra-contractuelle se prescrivent par dix ans à compter de la manifestation du dommage ou de son aggravation*” “*Lorsque le dommage est causé par des tortures et des actes de barbarie, des violences ou des agressions sexuelles commises contre un mineur, l’action en responsabilité civile est prescrite par vingt ans*” (Article 2270-1 of the *Code civil*).

There are special periods in respect of some causes of action. Where a claim is brought against a public body, the limitation period is four years (Law n° 68-1250 of 31 December 1968). In the case of an action against an airline, the plaintiff must initiate proceedings within two years from the date of disembarkation (article 29 of the Warsaw Convention). The victim of an accident at work has two years to initiate proceedings (article L. 431-2 *Code de la sécurité sociale*). In product liability cases, the claim must be initiated within three years from the date the plaintiff knew of his injury, or within ten years after the product had been put into circulation (article 1386-17 of the *Code civil*). According to Article 8 of the Paris Convention of 29 July 1960, in the case of a nuclear accident, the limitation period is ten years (or three years from the moment that the plaintiff knew of his injury and the identity of the defendant).

2. In the field of tort, the period of time does not begin to run until the injury emerges. Prior to 1985, the courts used to consider that the limitation period did not start to run until the plaintiff knew of his injury<sup>214</sup>. The law of 5 July 1985 provides for the starting point of the limitation period: it is the “manifestation” of the damage or its aggravation. Thus the starting point is neither the date of the wrongful act nor the date when the victim knew of his injury<sup>215</sup>. However, the solution does appear to depend upon the knowledge of the injured person<sup>216</sup>.

3. If there is an event which makes it impossible to commence proceedings, the limitation period does not start to run<sup>217</sup> (the notion of “impossibility” refers principally to *force majeure*). However the impossibility can also stem from the existence of a first set of proceedings upon which the second claim depends for compensation<sup>218</sup>. It can also stem from ignorance of the identity of the defendant, or his insurer<sup>219</sup>. In these cases the plaintiff is entitled to commence proceedings outside

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<sup>213</sup> Civ. 1<sup>re</sup>, 30 May 1967, *Bull. civ.* n° 189, p. 137.

<sup>214</sup> Civ. 11 December 1918, *S.* 1921, 1, 161.

<sup>215</sup> See M. BRUSCHI, *La prescription en droit de la responsabilité civile*, Economica, 1997, at 225.

<sup>216</sup> Civ. 2<sup>e</sup>, 28 May 1990, *Gaz. Pal.* 1990, pan. 156: the negligence of a surgeon lead to a second operation; time started to run from the second operation, that is to say when the knowledge of the injured person was established.

<sup>217</sup> Cass. Req., 22 June 1853, *S.* 1855, 1, 511; Civ., 28 June 1870, *S.* 1871, 1, 137; Civ. 1<sup>re</sup>, 22 December 1959, *J.C.P.* 1960.II.11494.

<sup>218</sup> Civ. 1<sup>re</sup>, 4 February 1986, *J.C.P.* 1987.II.20819, commentary by BOYER; Civ. 3<sup>e</sup>, 17 February 1964, *Bull. civ.* III, n° 78.

<sup>219</sup> Civ. 1<sup>re</sup>, 7 October 1992, *Droit et Patrimoine*, 1993, législation et jurisprudence, n° 33.

the normal limitation period. Where the defendant knowingly wastes time, in an attempt to extinguish the right of action, the judge has a discretion to allow the plaintiff to bring proceedings even where the principal limitation period has expired<sup>220</sup>.

4. Time does not run in relation to minors. There is therefore a suspension of the running of time for the duration of the infancy (Article 2252 of the *Code civil*: “*La prescription ne court pas contre les mineurs non émancipés et les majeurs en tutelle, sauf ce qui est dit à l’article 2278 et à l’exception des autres cas déterminés par la loi*”). A minor is defined in a negative way as a person who has not reached the age, fixed by law, which enables him to make use of his civil rights (18 years according to Law of 5 July 1974)<sup>221</sup>.

6. The solution is the same in relation to persons under a disability. If the injured person is under the charge of someone capable of taking proceedings on his behalf, the person under a disability will no longer benefit from the suspension but will have an action against his *tuteur* if the latter was negligent<sup>222</sup>. A person under a disability is a person considered by law as being unable to use some of his rights<sup>223</sup>.

## B. Stopping limitation

According to article 2244 of the *Code civil* (“*Une citation en justice, même en référé, un commandement ou une saisie, signifiés à celui qu’on veut empêcher de prescrire, interrompent la prescription ainsi que les délais pour agir*”), in order to interrupt the running of time the plaintiff has to issue a formal introductory act, transmitted by a judicial officer (*huissier*). However, there is more than one way to interrupt the running of time, and the word “*citation*”<sup>224</sup> means any act aimed at the initiation of proceedings, even where the act has not been transmitted formally by a *huissier*<sup>225</sup>. The purpose behind the rule is that the plaintiff must make it clear that he intends to commence proceedings against the defendant. This can include a request for arbitration<sup>226</sup>, a request of an expertise<sup>227</sup>, or the filing of pleadings<sup>228</sup>.

A demand made by the plaintiff to the court (*requête en injonction de payer*) requesting the issue of an injunction against the defendant in order to obtain payment of the debt is not considered as a *citation* interrupting the running for limitation purposes if the defendant could not be informed<sup>229</sup>. Nevertheless, if the injunction is issued by a court (*ordonnance d’injonction de payer*) and served on the defendant, this will be considered to constitute a *citation*<sup>230</sup>.

## C. Service

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<sup>220</sup> See A. SÉRIAUX, *La faute du transporteur*, *Economica*, 1984, n° 380.

<sup>221</sup> See S. GUINCHARD and G. MONTAGNIER, *Lexique de termes juridiques*, Dalloz.

<sup>222</sup> See. M. BRUSCHI, *La prescription en droit de la responsabilité civile*, cit., at 207.

<sup>223</sup> In *ibid.*

<sup>224</sup> See articles 385, 406 and 407 of the *Nouveau code de procédure civile*.

<sup>225</sup> Time is stopped from running even without registration in court: see Civ. 2<sup>e</sup>, 29 November 1995, *Bull. civ. II*, n° 294; Civ. 2<sup>e</sup>, 13 December 1995, *R.T.D.civ.* 1996, p. 465 and commentary by R. PERROT; however, the plaintiff has to transmit to the court a copy of the notification sent to the defendant within four months: see Ass. plén., 3 April 1987, *J.C.P.* 1987.II.20792.

<sup>226</sup> Civ. 2<sup>e</sup>, 11 December 1985, *J.C.P.* 1986.II.20677.

<sup>227</sup> Com. 2 April 1996, *Bull. civ. IV*, n° 112.

<sup>228</sup> Civ. 1<sup>re</sup>, 1<sup>st</sup> October 1996, *Bull. civ. I*, n° 334.

<sup>229</sup> Paris, 27 January 1988, *D.* 1988, *I.R.* 57.

<sup>230</sup> Civ. 1<sup>re</sup>, 10 July 1990, *Bull. civ. I*, n° 194; Com., 9 April 1991, *Gaz. Pal.* 1991, 2, pan., p. 268.

French rules concerning documents and formalities which must be complied with when the claim is not filed in France are contained in articles 688-1 to 688-8 of the *Nouveau code de procédure civile* (Decree n° 76-1236 of the 28 December 1976). These rules comprise the official procedures for the service of proceedings. The Ministry of Justice transmits the act to the competent court. The act will be served on the defendant by the police authorities. The act can also be transmitted to the *Chambre nationale des huissiers de justice* which will entrust the act to a territorially competent *huissier*. The *huissier* will then notify the defendant of the proceedings.

It is necessary to translate the proceedings where the defendant does not understand the language (article 688-6). The French authorities will give notice of the service of proceedings to the defendant after the accomplishment (article 688-7). According to the Hague Convention of 15 November 1965<sup>231</sup>, the proceedings can be sent by post or served from *huissier to huissier* (article 10 of the Convention).

#### **D. Insurance companies**

The plaintiff is not prevented from bringing proceedings against an insurance company<sup>232</sup>. Where the initial claim was made only against the defendant, the plaintiff may still bring proceedings against the liability insurer up until ten days prior to the hearing. The plaintiff may prefer to proceed directly against the insurer (*action directe*). The claim is based on article 1166 of the *Code civil* which regulates the *action oblique*, connected with article L. 124-3 of the *Code des assurances* which provides that the exclusive destination of the amount of money payable is to the injured person.

The *action directe* was first admitted by the *Cour de cassation* in 1939<sup>233</sup>. The limitation period could either be that provided for in the insurance contract (two years according to article L. 114-1 of the *Code des assurances*) or under the general provisions concerning civil liability. In the decision of 1939, the *Cour de cassation* stated that the limitation period applicable to the *action directe* is the same as the one applicable to the proceedings against the wrongdoer (ten years for tort and thirty years in contract for the two most common situations).

The insurer's duty to compensate the plaintiff for the injury stems from the insurance contract: according to article L. 112-6 of the *Code des assurances*, the insurer is entitled to rely as against the plaintiff upon any defence which would be available against the other party to the contract (“*L'assureur peut opposer au porteur de la police, ou au tiers qui en invoque le bénéfice, les exceptions opposables au souscripteur originnaire*”). The claims made clauses are forbidden. If some risks are not covered by the insurance contract, the injured person is not entitled to claim compensation from the insurer<sup>234</sup>. Any ceiling on the amount of compensation provided for in the contract must also be taken into consideration<sup>235</sup>. It must be noted that some defences are not available where the provision of insurance is mandatory (for example car insurance)<sup>236</sup>.

#### **E. Road traffic indemnity bodies**

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<sup>231</sup> Ratified by the Decree n° 72-1019 of 9 November 1972.

<sup>232</sup> According to the Law of 8 July 1983, the plaintiff can claim for compensation from the insurance company, even if the case is before a criminal court.

<sup>233</sup> Civ. 28 March 1939, *D.* 1939.1.68, commentary by PICARD.

<sup>234</sup> Civ., 26 April 1972, *R.G.A.T.* 1973.51; Civ. 1<sup>re</sup>, 1<sup>st</sup> October 1980, *R.G.A.T.* 1981.201.

<sup>235</sup> Civ. 1<sup>re</sup>, 15 February 1977, *J.C.P.* 1977.II.18737; Civ., 7 October 1975, *R.G.A.T.* 1976.379; Civ. 1<sup>re</sup>, 7 July 1992, *R.C.A.* 1992, n° 428; Civ. 1<sup>re</sup>, 9 June 1996, *D.* 1996. 610, commentary by Y. LAMBERT-FAIVRE.

<sup>236</sup> See article R. 211-12 of the *Code des assurances*.

When there is no insurance policy providing cover, there is a special body which provides compensation: the *Fonds de garantie automobile*, 64 rue de France, 94300 Vincennes. Compensation is payable when the driver responsible for the injury is not covered by a policy of motor insurance. The victim must be French or a citizen of a Member State of the European Union (or from a State which has a bilateral convention with France)<sup>237</sup>.

The driver responsible for the accident is precluded from making a claim for compensation, as is the injured person who is responsible for his own injury<sup>238</sup>. The body is seised of the matter where a French registered car has been involved in the accident<sup>239</sup>. The *Fonds de garantie* acts both in respect of uninsured drivers and untraced drivers.

When the driver is untraced, the police report must mention this fact and the report must have been transmitted to the *Fonds* within ten days. The injured person must initiate a claim within three years from the date of the accident<sup>240</sup>. In order to start proceedings, the victim must send a recorded delivery letter with a confirmation of receipt, specifying the nationality of the victim, the place, date and circumstances of the accident, details of the extent of any loss and injury and evidence that the victim has not received full compensation for his losses<sup>241</sup>. If there is no settlement of the victim's claim by the *Fonds*, there is a limitation period of five years from the date of the accident within which to commence formal proceedings against the *Fonds*<sup>242</sup>.

When the driver is uninsured, this must be cited in the police report, which shall be sent to the *Fonds* within ten days of the accident. Any request made to the *Fonds* must be within one year from the transaction with the wrongdoer or from the court's decision determining the liability of the wrongdoer<sup>243</sup>.

Finally, there may be occasions where the wrongdoer has insurance cover but the insurer raises arguments why it should not be liable to pay compensation to the injured person. The insurer must notify the *Fonds* of its intention to reject the claim<sup>244</sup>. The *Fonds* will decide whether to accept or reject the arguments relied upon by the insurer. Where the *Fonds* rejects the denial of liability of the insurer, the insurer may be obliged to compensate the injured person. The issue whether the insurer had an obligation to compensate the injured person will be decided at trial. Where it is found that the insurer was not under an obligation to provide compensation, and the wrongdoer is insolvent, the *Fonds* will reimburse the amount already paid by the insurer to the injured person.

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<sup>237</sup> See article R. 420-13-1 of the *Code des assurances*.

<sup>238</sup> See article R. 420-2 of the *Code des assurances*.

<sup>239</sup> If the car involved is registered in another Member State, the competent body for compensation is the *Bureau Central français*.

<sup>240</sup> See article R. 421-12 of the *Code des assurances*.

<sup>241</sup> See article R. 421-13 of the *Code des assurances*.

<sup>242</sup> See article R. 421-12 of the *Code des assurances*.

<sup>243</sup> See *id.*

<sup>244</sup> See article R. 421-5 of the *Code des assurances*.